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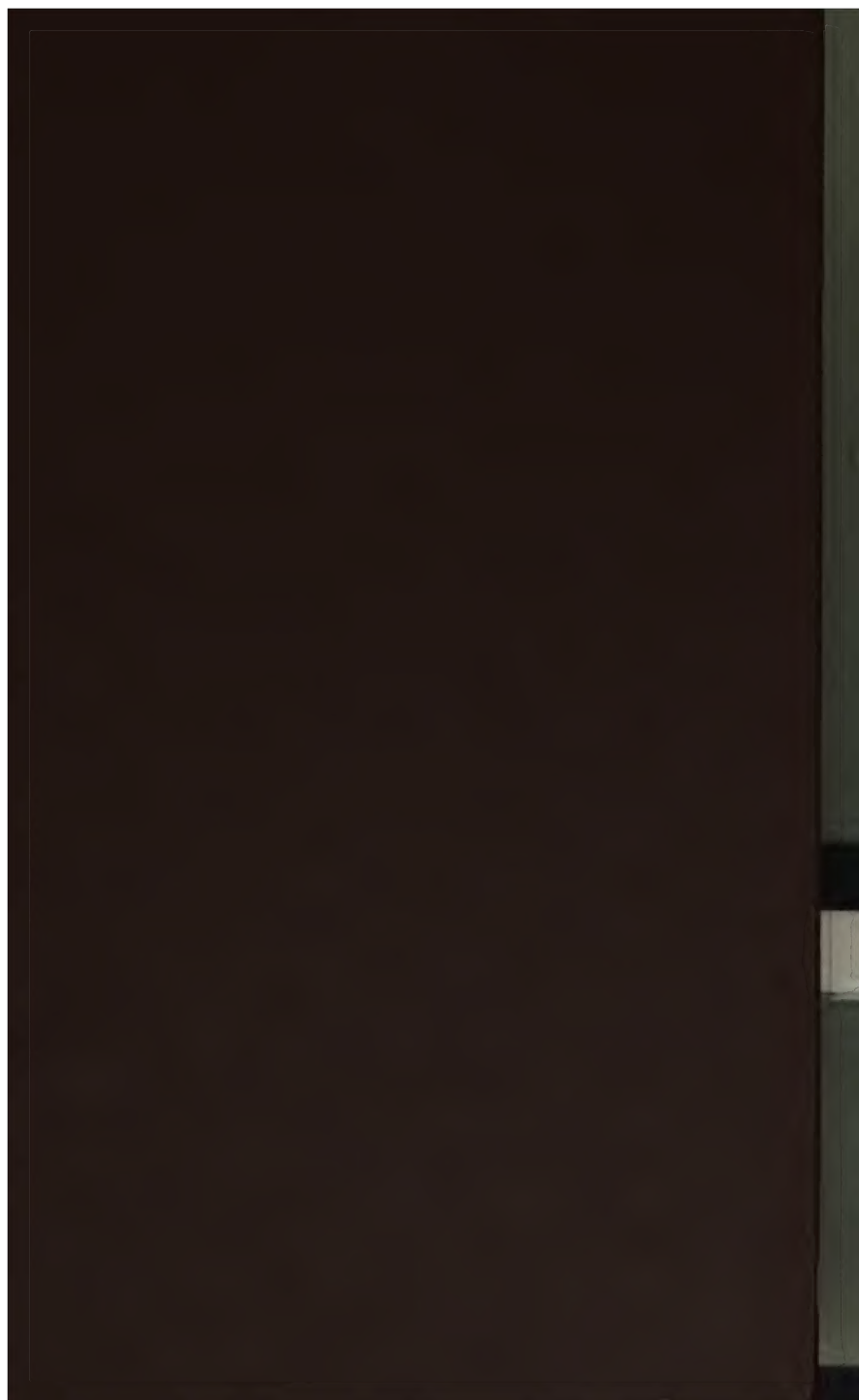
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THE INSTITUTES OF
JUSTINIAN.



Gonitica Puriata

Gonitica Centuriata

Gonitica Subrata

THE INSTITUTES OF
JUSTINIAN

*Hippis lbrs
Cambridge
Nov. 1878*

TRANSLATED WITH NOTES BY

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*Dixi saepius post scripta geometrarum nihil exstare quod vi ac
subtilitate cum Romanorum jureconsultorum scriptis comparari possit,
tantum nervi inest, tantum profunditatis.*

LEIBNITZ.

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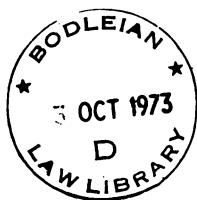
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PREFACE.

No book on law is better known than the *Institutes of Justinian*. No other legal work has obtained a reputation so high, or an influence so enduring. Designed simply as an elementary treatise, wherein the rudiments of law were to be found, and intended solely for the use of youthful students, it has lasted for 1300 years a standard authority on the leading doctrines of the Roman Law and an object worthy of the attention of advanced jurists. The text has been carefully revised and reprinted, its subject-matter has been exhaustively criticised and commented on, its scientific or systematic arrangement has been approved as the model of innumerable treatises on Law and Jurisprudence, and the very name of him under whose auspices it appeared has been inseparably linked with it.

In the prefaces to our edition of the *Commentaries of Gaius and the Rules of Ulpian*, we drew attention not only to the special nature and characteristics of those works, but to the peculiar influence of the lawyers of Rome during the period of 250 years, which intervened between the reign of Augustus and that of Alexander Severus. To this golden age of Jurisprudence, as we then showed, the world has been indebted for rich stores of wealth in the province of Jurisprudence and Law. With the close of that golden age, the learning, the skill and the fame of the Jurists of Rome ceased, and for nearly 300 years Roman Law shared the fate of Roman art and literature, and of Roman political and social life.

It would be out of place here, even if our space permitted it, to dwell on the devastation, the misery and the profligacy of the years that intervened between Diocletian and Justinian.

The history of the fate and fortune of the law would be but a record of weakness and decay. Among the lawyers of the West and East not one name of note is to be found ; among the rulers of the different divisions of the Empire none save Valentinian III., for his Law of Citations, and Theodosius II., for his celebrated Code, are worthy of notice. Nay to such a contemptible condition had the science of law fallen that Theodosius himself lamented : "Quod tam pauci extiterint qui juris civilis scientiâ ditarentur et soliditatem verae doctrinae susceperint."

Yet, strange to say, while the Roman lawyer was mute and the Roman ruler, with the two exceptions above named, careless and ignorant, the barbarian invaders of the empire, by whom Roman civilization had been ruined and Roman society destroyed, became active agents in the preservation of the Roman Laws. In the edict of Theodoric, in the Breviary of Alaric, in the Papiani Responsa or Lex Romana, the Ostrogothic, Wisigothic and Burgundian conquerors preserved a large portion of the text as well as the principles of Roman Jurisprudence.

The golden age of Jurisprudence, it is true, had given way to an iron age of lawlessness and ignorance. To the debasement of manners and morals throughout the whole Roman empire, and to the utter contempt of virtue, honour and social decorum pervading all ranks, from the Emperor to the lowest subject, was added a wave of invasion such as no time or country has ever seen. Under the overpowering influence of these destructive forces the whole fabric of Roman civilization was shaken, and Roman life as well as the old Roman Law, once so famous, seemed about to pass away for ever. Fortunately there were counteracting agencies at work, and under their influence the impending destruction was averted. Among those agencies the learned author of *The History of Civilization in Europe* has pointed out four.

The first sprang from that instinct by which man in the depth of his rudeness and ignorance is so powerfully influenced by a longing for better things, and a consciousness of

other powers than his own interests and passions. This agency was that love of order and of progress inherent in man's nature, and under which the barbarian conquerors of Italy and Gaul were led on to aspirations after civilization and social life.

The second agency was derived from what these barbarians saw around them, the wrecks of Roman civilization, the majestic ruins of Roman life and Roman law.

The third agency was Christianity. Here the influence was exerted first upon morality and order, and next upon social habits and political life. "Christianity attacked barbarism, as it were, at every point, in order to civilize by ruling over it¹."

Lastly, and here we quote the very words of the eloquent historian of Civilization, "there was a fourth agency, one which it is impossible fitly to appreciate, but which is not therefore the less real, and this is the appearance of great men. No one can say why a great man appears at a certain epoch, and what he adds to the development of the world; that is a secret of providence, but the fact is not therefore less certain. There are men, men whom the spectacle of anarchy and stagnation strikes and revolts, who are intellectually shocked therewith, as with a fact which ought not to exist, and are possessed with an unconquerable desire of changing it, a desire of giving some rule, somewhat of the general, systematic and permanent to the world before them. A terrible and often tyrannical power, which commits a thousand crimes, a thousand errors, for human weakness attends it; a power nevertheless glorious and salutary, for it gives to humanity and with the hand of man a vigorous impulse forward, a mighty movement."

Let us say a few, a very few words on each of these solvents of barbarism.

In proof of the first it is enough to point to the very codes, or attempts at codes, we have named, to show that, in the midst of the havoc they created, the barbarian conquerors of the West sought for something like rule and order,

¹ Guizot, *History of Civilization*.

with the view of founding a society durable and regular. Their efforts to reform the material world and themselves might be, and for a long period of time doubtless were, unproductive of permanent success. Their national characteristics were too overpowering to reconcile them easily and quickly to a condition approximating to regular, orderly social life. Perhaps "that need of justice, foresight and development, which agitates man even under the yoke of the most brutal selfishness," would have failed altogether in producing its effect, but for the fortunate influence of the second agency by which they were directly and vividly affected, that of a system of existing law forcing itself upon their attention, hallowed by long use, and recommended by the shrewd common sense which lay at the bottom of all its rules and precepts.

Sir Henry Maine has pointed out the remarkable influence of English Law as a system, upon native usage and native life in India¹. He has shown how primitive customary law has been affected in that quarter of the world by the importation of a body of express rules or principles, in number nearly sufficient to settle the disputes occasioned by increasing activity of life and multiplying wants.

Of a similar nature was the influence which the old Roman Law exercised upon the imagination of the northern invaders of Europe. They found express rules ready to hand and capable of settling all their disputes; they found judges engaged in the work of applying these rules to the suitors in their courts; they saw law-books in abundance, and lawyers ready to explain them; and they found that it was by no means difficult to appropriate these rules and make use of these books even to the extent of amalgamating them with their own usages and customs. One beneficial result at all events ensued, viz. that a large portion of the Roman Law was preserved from the destruction that awaited every other Roman institution.

¹ *Village Communities*, Lect. III. p. 74.

Of the third agency, that of Christianity, much might be written respecting its direct and indirect influence upon Roman Law;—for of its influence upon social life and humanity, great as that was, it is not within our province to speak. The law of marriage, the law of slavery, the law of succession *ab intestato*, the law relating to the *patria potestas*, the law regarding corporations, were strongly and directly affected by the doctrines insisted upon by the successors of the Apostles. In what particular directions, and to what precise extent the precepts of Christianity modified the Roman Law, is a subject deserving a careful examination. Unfortunately the space at our command forbids us from entering upon it, but no one who casts even a cursory glance upon the history of the civilized world during the 5th, 6th, and 7th centuries after the birth of Christ can fail to notice the immense influence of the Church and Christianity upon Legislation, Law and Social life.

Then, lastly, we have a few words to say respecting the agency of great men. Here, too, our remarks must be brief, nor is it necessary that they should be otherwise than brief.—“Great men have been among us” from the earliest time, and to some of them an abiding influence has attached, so that from their works a permanent beneficial result has flowed. To men like Charlemagne, Alfred, Frederick Barbarossa, the world, as well as their own particular country, owes much. Like them, and others whom it is superfluous to name, Justinian has earned his right to a niche in the Temple of Fame. That he was a great man few can deny who look at the history of the Empire for the 300 years that preceded, and for the 300 that succeeded his reign. Of his conquests, his wealth and power, his love of literature, it is no part of our present work to speak. But of his fame as a codifier of Law we may say something. Doubtless his method of codifying was not in all respects sound. Doubtless a *Corpus Juris*, if published under the auspices of an Alexander Severus, and with the help of a Papinian or an Ulpian, *would have been a work modelled upon a more*

systematic plan: but the idea of reducing the huge mass of Roman Laws into a comprehensive shape was a grand one. With all its faults the book of the Pandects was a conception worthy of a master mind. And when we remember at what period Justinian's labours were achieved, when we note the determined and continuous tendency of the Roman empire to decay, we must agree with the historian above quoted, that it is impossible to say why great men appear from time to time. What would have been the fate of Roman Law but for the codification, if we may use the term, which the emperor insisted upon? The old legend of the discovery of a copy of the Pandects at the siege of Amalfi, exploded as it is, at all events attests the value and stamps the influence of this volume of law.

But for Justinian's labours, where would have been the model for the great mercantile codes that have done so much to benefit the commercial world of Europe? But for Justinian's labours, where would have been the modern systems of law under which some of the greatest powers of Europe are now living? But for Justinian's labours where would have been that strong and auspicious ray of intellectual life which Dugald Stewart so eloquently describes as shot through the civilized world across the surrounding darkness¹?

With all his faults the Emperor was a great man; great in his own times and among the people with whom he came into contact, and great as a Law-giver even in this our 19th century. Eager for fame in his life, he loved to be surrounded with all the pomp and ceremony that a powerful monarch can command, and to be saluted with titles surpassing in number and magnificence those which had rewarded the achievements of his predecessors. For years after his death, fronting the Church of St Sophia, stood his statue, moulded in bronze and mounted on a huge column of brass. There, in the habit and arms of Achilles, he seemed to be leading on his troops against their old Persian foe, and there on the very spot where the vast silver

¹ *Introduction to the Encyclopædia Britannica.*

column of Theodosius had been reared, the Emperor's form and features continued for years to remind after generations of his power and his might. Yet, strange reading upon the vanity of human glory, his titles are laughed at, his military fame is despised, his grandeur and magnificence are forgotten, bronze and brass have long ago crumbled into dust, but one monument still remains, more lasting than bronze or brass or marble, a small book,—*The Institutes of Justinian*.

Upon the details of that book it is not our intention here to dwell. The subject has been so thoroughly handled, and the books wherein information upon it may be found are so accessible, that it is sufficient to name a few of them.—We therefore refer our readers to Gibbon's celebrated Chapter on the Roman law¹, to the article "Law" in the *Encyclopædia Metropolitana*, to Austin's *Province of Jurisprudence*, and to the articles on "Justinian" in Dr Smith's *Dictionary of Greek and Roman Biography*, and on the "Institutes of Justinian," in his *Dictionary of Greek and Roman Antiquities*. The chief objects we have kept in view in the work which follows are to present in a continuous form a text of the *Institutes* of the most correct and approved character; a translation in the same continuous form; short notes by way of illustration of particular passages or obscure allusions; and, in an Appendix, a few notes of a longer and more elaborate kind on some topics which struck us as deserving special exposition. Besides these topics there are many we should have liked to examine and illustrate, but the desire to keep this volume within moderate bounds prevented us from indulging our wishes. At some future day, if time and opportunity are given us, we hope to present to the public a continuous treatise on the Roman Law. Meanwhile our wish is that, like its companion volume on the *Commentaries of Gaius and Rules of Ulpian*, this, on the *Institutes of Justinian*, may be of practical use to the Student of Roman Jurisprudence.

¹ Ch. XLIV. The reader is strongly recommended to refer to Dr Smith's edition of 1854 for the sake of the notes.

ANALYSIS OF THE INSTITUTES.

INTRODUCTION.

AFTER defining Justice and Jurisprudence, and stating the three fundamental principles of Law: "honeste vivere, alterum non laedere, suum cuique tribuere," Justinian separates Law into its two branches, viz., *Public* and *Private*, and dismisses the former as unconnected with his subject.

Private Law he then tells us is derived from three Sources, viz.:

- I. 1.
 - (1) **Jus Naturale,**
 - (2) **Jus Gentium,**
 - (3) **Jus Civile.**

These he defines; and proceeds to divide the whole body of Private Law, 1st, according to its Form into Written and Unwritten: 2nd, according to its Application into

- I. 2.
 - (1) The Law relating to **Persons,**
 - (2) The Law relating to **Things,**
 - (3) The Law relating to **Actions.**

SECTION I.

THE LAW RELATING TO **Persons.**

- I. 3, 4. The primary division of Persons is into Liberi (Free), and Servi (Slaves).
Liberi again are either Ingenui or Libertini (Free-born or Free-made).
- I. 5-7. The mention of Libertini necessitates an explanation of the origin and method of Manumission: and a discussion of the restraints imposed on a master's right to manumit.
Another division of Persons is according to their exemption from or subjection to Potestas: thus we have
 - (1) persons **Sui Juris**, not under Potestas,
 - (2) persons **Alieni Juris**, under Potestas.

A. As to Persons Alieni Juris.

Potestas is of two varieties :

- (1) **Dominica Potestas**, exercised by Masters over their Slaves ;
- (2) **Patria Potestas**, exercised by ascendants over their descendants.

After a brief description of the powers attaching to I. 8. **Dominica Potestas**, Justinian proceeds to specify the classes of persons subject to **Patria Potestas**, viz.

- | | |
|---|------------|
| (1) Children born "ex justis nuptiis ;" | I. 9. |
| (2) Children legitimated ; | I. 10. 13. |
| (3) Children adopted. | I. 11. |

The mention of **Justae Nuptiae** leads to a digression on **Marriage, Conubium** and the **Prohibited Degrees**. I. 10.

It is next explained that **Adoption** is of two kinds ; viz. **Arrogation**, which takes place by Imperial Rescript, and **simple Adoption**, which merely requires the sanction of a Magistrate. The rules affecting these matters are there-I. 11. upon stated.

Potestas of either kind is terminable :

Dominica Potestas by Manumission, as already explained in I. 5—7.

Patria Potestas by

- (1) The death or captivity of the Ascendant,
- (2) The emancipation, adoption or promotion of I. 12. the Descendant.

B. As to Persons Sui Juris.

Persons **Sui Juris** are not necessarily free from all restraint, but may be under **Tutela**, if **Impuberes** ; or under **Curatio**.

Tutela admits of several varieties, described in detail, viz.

- (1) **Testamentaria** :

Exercised by the Nominee of a **Paterfamilias**. I. 13.

(A digression here takes place to explain what persons are ineligible for the office of Tutor.) I. 14.

- (2) **Legitima**, of three kinds, viz.

(a) Exercised by the nearest **Agnati**. I. 15.

Agnation is hereupon defined (and the mention of "agnation being destroyed

- I. 16. by Capitis Deminutio" leads to a d
sion on Capitis Deminutio).
- I. 17. (β) Exercised by the Patron ;
- I. 18. (γ) Exercised by the emancipating Ascen
- (3) **Fiduciaria :**
- I. 19. Exercised by the Descendant of an Emancip
- (4) **Honoraria :**
- I. 20. Exercised by the Nominee of a Magistrate
- I. 21. After a description of the Tutor's Authority, a
catalogue of the causes terminating it, we pass on to
- I. 22. **Curatio ;** which may be exercised
- (1) over persons who are Puberes, but not P.
Aetatis ;
- I. 23. (2) over persons Plenae Aetatis, if Madmen,
digals, &c.
- I. 24. The regulations for the provision of Sureties by T
- I. 25. and Curators next follow ; then a specification of the cas
- I. 26. which these persons may decline to act ; and lastly the
concerning their removal for misdeed or on suspicion of
deed.

SECTION II.

THE LAW RELATING TO **Things.**

Things are first classified as

- (1) **Res in nostro patrimonio ;**
- (2) **Res extra nostrum patrimonium ;** compreher
Res Communes, Res Publicae, Res Univers
and Res Nullius ; of which last-named variety
II. 1. 10. are the subdivisions, Res Sacrae, Res Religi
Res Sanctae.

Dismissing the Res extra Patrimonium, we have to
sider the modes whereby things of the other class ca
acquired ; and of these modes some are Natural and
are Civil. **Acquisition** moreover may be of an Indiv.
Thing, or of an Aggregate of Things ; see II. 9. 6.

- A. **Single Things** may be acquired **Naturally** in r
ways ; and Justinian specifies a large number of tl
but they are clearly variations of four only ; vi

- (1) **Occupation,**
- (2) **Accession,**
- (3) **Specification,**
- (4) **Tradition.**

II. 1.

A* Parenthetically another Division of Things is introduced at this point, viz. that into

- (1) **Res Corporales**: "quae tangi possunt;"
- (2) **Res Incorporales**: "quae non tangi possunt," such as II. 2.
 - (a) Servitutes Urban and Rustic, i.e. **Praedial** II. 3.
Servitutes, II. 4. 5.
 - (β) Usufruct, Use and Habitation, i.e. **Personal**
Servitutes,
 - (γ) **Inheritance** } reserved for future considera-
 - (δ) **Obligation** } tion; see II. 5, 6.

After a full account of Servitutes, the subject of Acquisition is resumed, and we pass on to the statement that

A. **Single Things** may be acquired **Civilly** by

- (1) **Usucapion and Praescription,** II. 6.
- (2) **Donation,** whether
 - (a) **Mortis Causa** or
 - (β) **Inter Vivos**; of which one variety, viz. II. 7.
 - Propter Nuptias,** is specially dwelt upon; or
 - (γ) **Per Legatum aut per Fideicommissum**: but these classes of Gifts are reserved for future consideration; see II. 9. 6.

As Gifts can only be made by persons who have the Right to Alienate, Justinian next proceeds to explain (but not with reference to Gifts alone)

- (1) In what cases an **Owner may not alienate,**
- (2) In what cases a **Non-Owner may alienate.** II. 8.

Then considering Alienation from another aspect, he informs us that a man may **acquire**

- (1) Through his own act
- (2) By means of Persons under his Potestas;
 - (Hence a digression on Peculium, which the Ascendant does not acquire.)
- (3) By means of Slaves in whom he has the Usufruct;
- (4) By means of Persons Possessed by him in good faith as Slaves. II. 9.

B. The modes of acquiring an **Aggregate** (**Universitas**) are four (all Civil), viz.

I. Inheritance, II. Bonorum Possessio, III. Arrogation, IV. Addition.

Taking these in order :

I. Inheritance may be either **Testamentary** or **Intestate**.

The **Law of Testaments** is therefore first discussed, and we are told

- II. 10. (1) That the Testament must be correct in Form and in the Number and Character of the Witnesses :
- II. 11. But on these points there were relaxations in the case of a Military Testament.
- II. 12. (2) That the Testator must have **Testamenti Factio**. A catalogue therefore is given of persons not possessing **Testamenti Factio**.
- II. 13. (3) That the Testator must appoint or disinherit his Descendants.
- II. 13. The rules on this subject are set forth at great length, but are too complicated for insertion in this analysis : see a discussion of them in App. E.
- (4) That the Heir must be appointed in due form; and may be
 - (a) Free or Slave ;
 - (β) Appointed to the whole or a part ;
 - (γ) Appointed absolutely or under condition ;
- II. 14. Also when there are Several Heirs, they may be appointed either simultaneously or successively ; and if successively,
- II. 15. (δ) By way of Vulgar Substitution, or
- II. 16. (ε) By way of Pupillar Substitution.
- II. 17, 18. (5) That the Testament must not be **Ruptum**, **Ir-ritum** or **Inofficiosum**, of which terms full explanations are given by our author. (See also App. F.)

In a Testament duly made

- (1) **An Heir** can be appointed ; who takes all the rights and liabilities of the Deceased.

Hence a classification of Heirs is given, and mention is also made of the Safeguards or Beneficia, which protected each class from pecuniary loss, viz.

- (a) Necessarii Heredes, with the Beneficium Separationis,
- (β) Sui et Necessarii Heredes, with the Beneficium Abstinendi,
- (γ) Extranei Heredes, with the Beneficia De-II. 19. liberandi or Inventarii.

(2) **Legacies** can be given.

The numerous and somewhat confused rules which Justinian lays down regarding legacies are treated of in App. G. He treats particularly of the cases II. 26. in which Legacies are Void ; of their Revocation, and of the Restrictions on their Amount. II. 21, 22.

(3) **Fideicommissa** can be given, whether

- (a) Fideicommissary Inheritances ; II. 23.
- (β) Fideicommissa Singulae Rei ; which at one time were different in many important respects from Legacies, but were made equivalent to them by Justinian, as he informs us II. 24. in II. 20. 3.

As a Fideicommissary Inheritance could be bestowed by Codicil, though a Legal Inheritance could not, occasion is taken to compare a Codicil and Testament. We then pass on to

Intestate Inheritance ; and are informed that in this case the Order of Succession is

- (1) The Sui Heredes and those admitted with them ; III. 1.
- (2) The Agnati and those admitted with them ; III. 2.
- (3) Those entitled under the SCC. Tertullianum and Orphitianum ; III. 3, 4.
- (4) The Cognati. III. 5.

An explanation of the principle of reckoning the Degrees of Cognation is inserted ; and we are then informed of special rules applicable to the Successions of Freedmen. These having been set forth, the subject of Inheritance is exhausted ; and the other Modes of acquiring an Aggregate are discussed in order, viz.

II. **Bonorum Possessio**, which is either

- (1) *Contra Tabulas* :
- (2) *Secundum Tabulas* :
- (3) *Ab Intestato* :

III. 9.

III. 10. III. **Arrogation** :III. 11. IV. **Addictio Libertatum Servandarum Causa.**

Mention is also made of certain ancient and obsolete forms of Universal Succession, viz. *Bonorum Emptio* and the *Successio ex Senatus consulto Claudiano*.

C. Then the discussion of **Obligations** is resumed from A* (2) (δ) above (II. 5) : and Obligations are divided

- (1) According to the Law on which they are based, into Civil and Praetorian ;
- (2) According to their originating circumstance, into
 - (α) Obligations **ex Contractu** :
 - (β) Obligations **Quasi ex Contractu** :
 - (γ) Obligations **ex Delicto** (ex Maleficio) :
 - (δ) Obligations **Quasi ex Delicto** (Quasi ex Maleficio).

III. 13.

Taking the first of these branches in detail, we have **Obligations ex Contractu** originating

- III. 14. (1) **Re** : as in the cases of *Mutuum*, *Commodatum*, *Depositum*, *Pignus* ;
- (2) **Verbis** : as in the case of *Stipulations* ;
- III. 15. A minute discussion of *Stipulations* is hereupon given, especially of
- III. 16. Joint *Stipulations* ;
- III. 17. *Stipulations* made by *Slaves* ;
- III. 18. The various kinds of *Stipulations*, viz. *Judicial*, *Praetorian*, *Conventional* ;
- III. 19. Void *Stipulations* ;
- III. 20. *Sureties* (*Fidejussores*) whether to *Stipulations* or other *Contracts*.
- III. 21. (3) **Litteris** :
- (4) **Consensu** : as in the case of *Emptio-Venditio*, *Locatio-Conductio*, *Societas* and *Mandatum*.

III. 22-27. The **Quasi-Contractual Obligations** are next considered.

Then follows a digression in which it is shewn how a man can be put under obligation to another not only by the

act of that other, but by the act of persons under the other's **Potestas**. III. 28.

The next matter for consideration is the mode of **Dissolving Obligations**, which may be

- (1) by **Solution** (i.e. Fulfilment) :
- (2) by **Acceptilation** :
- (3) by **Novation** :
- (4) by **Contrary Intent**, when the Obligation is **Con-** III. 29.
sumed.

The **Delict Obligations** are now treated of, viz.

- | | |
|-----------------------------------|--------|
| (1) Furtum : | IV. 1. |
| (2) Rapina : | IV. 2. |
| (3) Damnum injuria datum : | IV. 3. |
| (4) Injuria : | IV. 4. |

And lastly, the **Obligations Quasi ex Delicto**. IV. 5.

SECTION III.

THE LAW RELATING TO **Actions**.

Actions are classified on several principles :

- I. As Actions **in Rem** or **in Personam** :
- II. As Actions **Civil** or **Praetorian** :
- III. As Actions for **Recovery of the Thing**, or for **Recovery of a Penalty**, or for both objects (**Mixt Actions**) :
- IV. As Actions **Stricti Juris** or **Bonae Fidei** : IV. 6. 30.
In which last-named class of Actions **Compen-** IV. 6. 40.
satio is allowed.

Actiones Arbitrariae, a variety of **Bonae Fidei** Actions, are specially discussed ; also the effect of **Plus Petitio**. Then we have an account of the Actions in which the Defendant is only made to pay in "quantum facere potest ;" and as the **Action de Peculio** is one of these an opportunity is afforded for specifying the **Actions maintainable against a Father or Master** in respect of the acts of his Sons or Slaves, viz. the Actions.

- (1) **Quod Jussu** ;
- (2) **Exercitoria** and **Institoria** ;
- (3) **Tributoria** ;

IV. 7. 5. (4) De Peculio et in Rem verso :

IV. 7. 7. and this leads to a consideration of the provisions of the SC. Macedonianum.

Then from the Contracts of persons under Potestas we
IV. 8. pass to their Delicts, and the subject of Noxal Actions is considered : to which succeed some remarks on the

IV. 9. Actio de Pauperie.

Actions, we are next told, can be brought **Personally or by Agents**, such as

IV. 10. Procurators, Tutors, and Curators ;

IV. 11. and **Sureties** have to be furnished in certain cases by the Parties or their Agents.

We now have two more classifications of Actions, viz.

V. **Perpetual or Temporary.**

IV. 12. VI. Maintainable by or against Heirs, or not so maintainable.

Next an explanation is given of

IV. 13. (1) **Exceptions :**

IV. 14. (2) **Replications, Duplications, Triplications, &c.**

(3) **Interdicts ;**

which are classified

(a) Into **Prohibitory, Restitutory, Exhibitory,**

(β) Into Non-Possessory and Possessory, the Possessory being again subdivided into

(1) Interdicta **adipiscendae** possessionis causa,

(2) Interdicta **retinendae** possessionis causa,

(3) Interdicta **recuperandae** possessionis causa,

IV. 15. (γ) Into **Simple and Double.**

Some of the Safeguards against **Rash Litigation** are specified, such as

(a) **Jusjurandum Calumniæ :**

(β) **Actio dupli adversus infitantes, &c.**

IV. 16. A few words follow on the subjects of Ignominia and Vocatio in Jus ; and the last two Titles of the work give an

IV. 17, 18. account of the **Duties of a Judge** and a short sketch of the **Judicia Publica** or Criminal Actions.

PROOEMIUM.

IN NOMINE DOMINI NOSTRI JESU CHRISTI.

IMPERATOR CAESAR FLAVIUS JUSTINIANUS, ALAMANNICUS, GOTHICUS, FRANCICUS, GERMANICUS, ANTICUS, ALANICUS, VANDALICUS, AFRICANUS, PIUS, FELIX, INCLYTUS, VICTOR AC TRIUMPHATOR, SEMPER AUGUSTUS,

CUPIDAE LEGUM JUVENTUTI.

Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari; et princeps Romanus victor existat non solum in hostilibus praeliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam juris religiosissimus, quam victis hostibus triumphator.

PREFACE.

IN THE NAME OF OUR LORD JESUS CHRIST.

THE EMPEROR CAESAR FLAVIUS JUSTINIANUS, CONQUEROR OF THE ALAMANNIANS, GOTHs, FRANKs, GERMANs, ANTIANS, ALANS, VANDALS, AFRICANS, PIOUS, HAPPY, GLORIOUS, VICTORIOUS AND TRIUMPHANT, EVER AUGUST

TO THE YOUTH EAGER TO KNOW THE LAWS.

It behoveth that our Imperial Majesty be not only glorified with arms but also armed with laws, so that alike the time of war and the time of peace may be rightly guided: and the Roman Prince not only prove victorious in battles against his foes, but also repress by due course of law the misdeeds of evil-doers, and be as well the maintainer of the sanctity of law as the *triumpher over vanquished enemies*.

1. Quorum utramque viam cum summis vigiliis summaque providentia, annuente Deo, perfecimus. Et bellicos quidem sudores nostros barbaricae gentes sub juga nostra deductae cognoscunt, et tam Africa quam aliae numerosas provinciae post tanta temporum spatia, nostris victoriis, a coelesti Numine praestitis, iterum dicioni Romanae nostroque additae imperio protestantur; omnes vero populi legibus tam a nobis promulgatis quem compositis reguntur. 2. Et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam ad immensa veteris prudentiae volumina; et opus desperatum, quasi per medium profundum euntes, coelesti favore jam adimplevimus. 3. Cumque hoc Deo propitio peractum est, Triboniano, viro magnifico, magistro et exquaestore sacri palatii nostri, nec non Theophilo et Dorotheo, viris illustribus, antecessoribus nostris
X quorum omnium sollertiam et legum scientiam et circa nostras
jussiones fidem jam ex multis rerum argumentis accepimus convocatis, specialiter mandavimus ut nostra auctoritate nos-

1. By unlimited diligence and infinite forethought we have, with God's favour, accomplished both these aims. The barbarian races, subjected to our yoke, recognize our energy in war: Africa too and countless other provinces attest it, restored once more to the dominion of Rome and our own empire, after so long an interval, through those victories which have been bestowed on us by the Providence of Heaven. All nations moreover are now governed by laws published and drawn up by ourselves. 2. And after bringing into lucid harmony the imperial constitutions heretofore in confusion, we next extended our care to the innumerable volumes of ancient jurisprudence, and sailing as it were through mid ocean, have now completed with the blessing of Heaven a work that was beyond hope. 3. When again by God's kindness this toil had been accomplished, we summoned that Eminent Personage, Tribonian, Master and Ex-Quaestor of our Sacred Palace, together with Theophilus and Dorotheus, of Illustrious Rank, Professors, (of whose diligence, knowledge of law and fidelity in executing our commands we have already received proof in many transactions), and gave them special directions to draw up by our authority and at our instance a primary text-book or

trisque suasionibus Institutiones componerent, ut liceat vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere; et tam aures quam animae vestrae nihil inutile nihilque perperam positum, sed quod in ipsis rerum obtinet argumentis, accipiant. Et quod in priore tempore vix post quadriennium prioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce principali procedat. 4. Igitur post libros quinquaginta Digestorum seu Pandectarum, in quibus omne jus antiquum collatum est, (quos per eundem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus), in hos quatuor libros easdem Institutiones parti jussimus, ut sint totius legitimae scientiae prima elementa. 5. In quibus breviter expositum est et quod antea obtinebat, et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est. 6. Quas

Institutes: that it may be in your power to learn no longer the first elements of law from ancient fables, but to derive them from the Imperial Effulgence; and that your ears and minds alike may receive nothing useless and nothing wrongly defined, but only what accords with actual practice: and that whereas in former times, after a four years' course of study, it was scarcely possible for your predecessors to read even then the Imperial Constitutions, you may at the very outset proceed to their perusal, being accounted worthy of an honour so grand and meeting with a gift of fortune so great, that both the commencement and the completion of your legal education proceeds from the mouth of your Emperor. 4. Hence after (the completion of) the fifty books of the Digest or Pandects, in which the whole of the ancient law has been gathered together (which books we compiled through the instrumentality of the same Eminent Personage, Tribonian, and other Illustrious and Most Eloquent men), we directed that the aforesaid Institutes should be arranged in these four books, to be the first elements of the whole science of the law. 5. In them a brief exposition has been given both of the rules formerly prevailing and of those which, after becoming obscured by disuse, were subsequently made bright again by our Imperial renovation. 6. These Institutes, compiled

indar "Inicium inferiorum"

ex omnibus antiquorum institutionibus, et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cotidianorum, aliisque multis commentariis compositas cum tres praedicti viri prudentes nobis obtulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

7. Summa itaque ope et alacri studio has leges nostras accipite; et vosmetipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rempublicam in partibus ejus vobis credendis gubernari.

Data undecimo calendas Decembres, Constantinopoli, domino nostro Iustiniano perpetuo augusto tertium consule.

from those of all the ancient authorities, and particularly from the Commentaries of our friend Gaius, whether in his Institutes or his work "On every-day matters," and from many other Commentaries, the three learned men before-named submitted to us; and after reading and considering them, we have bestowed on them the most complete authority as Constitutions of our own.

7. Receive therefore with all diligence and with eager attention these laws of ours, and show yourselves so well-versed in them, that the fair hope may animate you of being able, when the whole course of your legal study is completed, to govern our Empire in such regions as may be entrusted to your care.

Given at Constantinople on the eleventh day before the Kalends of December, in the third Consulship of our Lord Justinian, Ever-August.

THE INSTITUTES OF
JUSTINIAN.

BOOK I.

ERRATA.

PAGE	LINE	
4	22	for <i>nature</i> read <i>nations</i> .
6	18	after <i>hiring</i> insert <i>partnership</i> .
19	11	for <i>be manumitted</i> read <i>manumit</i> .
53	33	for <i>has no</i> read <i>has never had</i> .
97	15, 16,	for <i>ascripti</i> read <i>adscripti</i> .
136	39	for <i>Iustinian himself</i> read <i>Theodosius and Valentinianus</i> .
181	24	for <i>one</i> read <i>a stranger</i> .
181	38	for <i>necessarius</i> read <i>extraneus</i> .
414	17	for <i>Ædilian</i> read <i>Ædilitian</i> .
453	25	for <i>Julia</i> read <i>Fabia</i> .

sitions being understood, we think that as we are about to expound the laws of the Roman people, they can be dealt with most conveniently, if individual topics receive first an easy and simple explanation and afterwards one thoroughly careful and exact. For if we adopt the contrary plan and at the very

¹ Quoted from Ulpian's *Rules* in D. 1. 1. 10.

² D. I. I. 10.

statim ab initio rudem adhuc et infirmum animum studii
titudine ac varietate rerum oneraverimus: duorum alteri
desertorem studiorum efficiemus, aut cum magno labori
saepe etiam cum diffidentia quae plerumque iuvenes
serius ad id perducemus ad quod leviori via ducti
magno labore et sine ulla diffidentia maturius perduc
isset¹.

outset load the mind of the student, whilst yet inexperienced
and untrained, with a multitude and variety of subjects,
two results will follow—we shall either make him desist from
studies, or after much toil on his part, and in many cases
after that self-distrust which so often turns young folk
we shall bring him more tediously to that very same path
which, if led by a more easy path, he could have followed
quickly enough without any great trouble and without
distrust of himself¹.

¹ An ambiguity runs through all these preliminary observations, for *right* and *positive law*, two totally distinct matters, are confounded. A right is the creation of a law of some species or other, but the only rights with which the Institutes have to do are those originating from positive laws, and those too the positive laws of a single state, the Roman empire. Rights in the most comprehensive acceptation are divided into four classes, divine, natural, moral or positive, correlating to the four possible varieties of duties. For when a duty is created, all persons interested in its enforcement are invested with a right. The varieties of rights therefore are in number exactly equal to the varieties of duties. And duties again are precisely as various as their sources. These sources are the divine law, the natural law, the moral law and the positive law; and we will not at present do more than state that of these four the first and last alone are truly termed *law*, leaving those who would master the questions we here briefly indicate to read the preliminary

lectures in Austin's *S jurisprudence*. *Divine Law* is the will of God revealed to us in scripture and enforced by the sanctions of divine judgments, temporal or eternal: from this spring duties, and from these in their turn originate divine rights. *Law* is also frequently styled *positive law*, being the aggregate of the laws which the Creator has laid down for the guidance of his rational creatures, and which they can gather in only by revelation, whether by the moral sense or instinct (according to one school of philosophers, by experience and calculation), which is to the advantage of the human kind at large (according to the opposite school): this too originates duties, and from these spring rights. *Moral Law* is the sum of the sentiments as to right and wrong entertained by the majority of a community or body of men, to which every member of the body must conform on peril of incurring definite evils at the hands of the community whose wishes he disregards. Once more we have duties:

3. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere¹.

4. Huius studii² duae sunt positiones, publicum et privatum. publicum ius est³, quod statum rei Romanae spectat; privatum, quod ad singulorum utilitatem pertinet. Dicendum est igitur de iure privato, quod tripartitum est. collectum est enim ex naturalibus praeceptis, aut gentium, aut civilibus⁴.

3. The leading principles of Right are these: to live honestly; not to injure another; to give to each his own¹.

4. Of this science² there are two branches, public and private. Public Law³ is that which regards the constitution of the Roman state: Private Law is that which deals with the interests of individuals. Our topic then is Private Law, which in its origin is threefold, being a collection of precepts of the Natural Law, of the Law of Nations, and of the Civil Law⁴.

responding rights. *Positive Law* (Jus Civile) emanates from the supreme power of a state, and is *Law* properly so called, the province of Jurisprudence. Justinian starts with certain definitions which would include all the branches of law (with their corresponding duties and rights) just named, but he quickly abandons them, and confines his attention to the Positive Law of Rome, and the rights and duties springing therefrom.

¹ D. I. I. 10.

² In § 3 Justinian was plainly speaking of Natural Rights, here he is as obviously referring to Positive Rights, creatures of the *Jus Civile*; but he never explains his transition, and possibly did not perceive he had made one.

³ This sentence again is abbreviated from Ulpian's *Rules*: see D. I. I. 1. 2.

⁴ Law (positive or civil law) is always the creation of positive enactment. But law may be either original or derived. It is original, if

enacted without reference to anything but the necessities of a state, and independent of the natural law or the law of other nations. But as a prudent lawgiver is frequently led to reenact a natural law and embody it in his own system, and also frequently induced to adopt a law of other nations which appears to him useful, we find a species of positive law which may be styled derived. Thus positive or civil law, though in all cases having enactment for its immediate source, may have either the natural law or the law of other nations (*i. e.* morality as it ought to be or morality as actually existing) for its remoter origin.

It may be observed that *jus gentium* in the writings of the Roman jurists has frequently a technical meaning, of which we shall speak hereafter; but in this passage Justinian seems to be using the phrase in its general and obvious sense of "the law which is common to all (or the majority of) nations."

Municipal Law
Public Law *Private Law*

TIT. II. DE IURE NATURALI ET GENTIUM ET CIVILI.

Ius naturale est, quod natura omnia animalia docuit. nam ius istud non humani generis proprium est, sed omnium animalium quae in coelo, quae in terra, quae in mari nascuntur. hinc descendit maris atque feminae coniugatio quam nos matrimonium appellamus; hinc liberorum procreatio et educatio. videmus etenim cetera quoque animalia istius iuris peritia censer¹.

1. Ius autem civile vel gentium ita dividitur. omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est, vocaturque ius civile, quasi ius proprium ipsius civitatis;

TIT. II. ON THE NATURAL LAW, THE LAW OF NATIONS
AND THE CIVIL LAW.

The Natural Law is that which nature has taught all living creatures. For that law is not peculiar to the human race, but extends to all animals which exist in the air, on land or in the sea. From this originates the union of male and female, which we call marriage: from this the procreation and bringing-up of children; for we see that other living creatures besides man are gifted with a perception of this law¹.

X 1. Civil law and the law of nature are thus distinguished. All associations of men which are governed by laws and customs employ a system of law that is partly peculiar to themselves, partly shared in common by all mankind: for what any such association hath established as law for its own guidance is special to that state, and is called its *jus civile*, the particular

¹ This paragraph is borrowed from Ulpian's *Institutes*, Bk. I. (see D. I. 1. 1. 3) and introduces an additional confusion into a matter already sufficiently confused. Justinian's conception of Natural Law enunciated in his first title needed explanation and correction, but here he adopts without qualification a totally different definition of natural law, which

makes it equivalent to instinct. It is needless to do more than point out the contradiction, as the reader who wishes for a full discussion of the subject in all its bearings will find one in Austin's *Jurisprudence*, Lecture XXXI., Savigny, *Gesch. de Röm. Rechts*, vol. I. ch. I. See also Gaius I. 1. (A and W) and the notes thereupon.

quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur¹. Et populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. quae singula qualia sunt, suis locis proponemus.

2. Sed ius quidem civile ex unaquaque civitate appellatur, veluti Atheniensium. nam si quis velit Solonis vel Draconis leges appellare ius civile Atheniensium, non erraverit. sic enim et ius quo populus Romanus utitur ius civile Romanorum appellamus; vel ius Quiritium, quo Quirites utuntur: Romani enim a Quirino Quirites appellantur. Sed quotiens non addimus cuius sit civitatis, nostrum ius significamus: sicuti cum poetam dicimus, nec addimus nomen, subauditur apud Graecos egregius Homerus, apud nos Virgilius. Ius autem gentium omni humano generi commune est. Nam usu

law, so to speak, of that very state: but that which natural reason hath established amongst all men is guarded in equal degree by all associations, and is called *jus gentium*¹, the law, so to speak, which all nations employ. The Roman people, therefore, make use of a system of law which is partly their own in particular, partly common to all mankind. What these portions of their system severally are, we shall explain in their proper places.

2. A system of civil law bears the name of the state which obeys it, the civil law of the Athenians for instance. For if any one chose to call the laws of Solon or of Draco the civil law of the Athenians, his nomenclature would be correct. So also the law which the Roman people employs we call the civil law of the Romans, or the *Jus Quiritium*, because adopted by the Quirites, since the Romans are styled Quirites after Quirinus. But whenever we speak of *the* civil law without specifying of what nation, we intend our own law: just as when we speak of *the* poet and do not add his name, glorious Homer is understood by the Greeks, and Virgil by ourselves.

The law of nations on the other hand is common to all man-

¹ Quoted from the excerpt of Ulpian in D. I. I. I. With this portion of Ulpian's definition little fault can be found; for *jus gentium* is, as he

implies, morality in its existing form: although *jus naturale* should not be defined as instinct, but as morality in the form which it ought to take.

exigente et humanis necessitatibus¹, gentes humanae quaedam sibi² constituerunt. bella etenim orta sunt et captivitates secutae et servitutes quae sunt iuri naturali contraria: iure enim naturali ab initio omnes homines liberi nascebantur³. Ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum, et alii innumerabiles.

3. Constat autem ius nostrum aut ex scripto, aut ex non scripto: ut apud Graecos, τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι⁴. Scriptum ius est lex, plebiscita, senatusconsulta, principum placita, magistratuum edicta, responsa prudentium.

kind¹; because through the requirements of experience and human needs the races of mankind have established certain rules for themselves². For wars arose and thence ensued captivity and servitude, which are contrary to natural law: since according to natural law all men were born free originally³. From this law of nations originated almost all contracts, as buying and selling, letting and hiring, deposit, loan and countless others.

3. Now our law has two branches, written and unwritten: just as the Greeks say, τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι⁴. The written law consists of *leges*, *plebiscita*, *senatusconsulta*, enactments of the Emperors, edicts of the magistrates, responses of those learned in the law.

¹ By *jus gentium* in the present passage Justinian implies customs of universal acceptance, general morality. Such customs will usually accord with the natural law,—not the natural law just spoken of by our author in I. 2. pr., that being merely instinct common to men and beasts,—but the true natural law, which is the unrevealed law of God and can be obeyed by his rational creatures only. There will be a general harmony between the *jus gentium* and the *jus naturale*, because the groundwork of the latter is utility or the advantage of mankind at large, for which men have a general inborn desire, since the advantage of the individual is usually dependent on the advantage of the whole race. But as this is not always the case,

one man or one nation may sometimes prefer private utility to public utility, and then there is a conflict between morality as it ought to be and morality as it is, that is to say between *jus gentium* and *jus naturale*. Of this occasional contrariety Justinian adduces an instance in I. 2. 2, where he speaks of captivity and slavery being creations of the *jus gentium* and reprobated by the *jus naturale*.

² They have established them for themselves, i.e. according to their own selfish pleasure and without reference to the natural law, which would insist on a regard for the pleasure and utility of all the world.

³ See Ulpian and Hermogenianus in D. I. I. 1. 4 and 5.

⁴ Ulpian in D. I. I. 1. 6.

4. *Lex* est quod *populus Romanus*, senatorio magistratu interrogante veluti consule, constituebat. *Plebiscitum* est quod *plebs*, plebeio magistratu interrogante veluti tribuno, constituebat. *Plebs* autem a *populo* eo differt, quo species a genere. nam appellatione *populi* universi cives significantur, connumeratis etiam patriciis et senatoribus; *plebis* autem appellatione, sine patriciis et senatoribus ceteri cives significantur. sed et *plebiscita* lege *Hortensia* lata non minus valere quam *leges* coeperunt¹.

5. *Senatusconsultum* est quod *senatus* iubet atque constituit. Nam cum auctus est *populus Romanus* in eum modum, ut difficile sit in unum eum convocari legis sancienda causa: aequum visum est *senatum* vice *populi consuli*².

4. A *lex* is what the *populus Romanus* establishes on the proposition of a senatorial magistrate, such as a Consul. A *plebiscitum* is what the *plebs* establishes on the proposition of a plebeian magistrate, such as a Tribune. The *plebs* differs from the *populus* as a species differs from a genus: for by the appellation of *populus* the whole body of citizens is denoted, including the patricians and senators; whilst by the appellation of *plebs* is denoted the rest of the citizens, excluding the patricians and senators. But after the passing of the *Lex Hortensia* *plebiscites* began to have an equal force with *leges*¹.

5. A *senatusconsultum* is what the senate directs and establishes. For when the Roman people had so greatly increased that it was difficult for them to be assembled together in order to sanction laws, it was deemed expedient that reference should be made to the senate in their stead².

¹ The *Lex Hortensia* was enacted in B.C. 286. Livy (in III. 55) says that it was ordered in the *Lex Valeria Horatia*: "ut quod tributim plebes jussisset populum teneret;" and in VIII. 12 he quotes the words of the *Lex Publilia*: "ut plebiscita omnes Quirites tenerent." A method of harmonizing these apparent contradictions is given in our note on Gaius I. 3.

² The power of the senate to legislate (except on matters specially remitted to it by the *populus* assembled in *comitia*), was denied in republican times (see Gaius I. 4): but under the emperors the senate became the emperor's mouthpiece, promulgating the decrees which he might have issued on his own authority, but which for decency's sake he published through them.

6. Sed et quod principi placuit legis habet vigorem: cum lege regia¹ quae de imperio eius lata est populus ei et in eum omne suum imperium et potestatem concessit. Quodcumque igitur imperator per epistolam constituit, vel cognoscens decrevit, vel edicto praecepit, legem esse constat: hae sunt, quae constitutiones appellantur². plane ex his quaedam sunt personales, quae nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod alicui ob merita indulsit, vel si cui poenam irrogavit, vel si cui sine exemplo subvenit, personam

6. The will of the Emperor has also the force of law: since by the *lex regia*¹, passed to define his authority, the people have granted for him and to him all their authority and power. Whatever, therefore, the Emperor has established by his letter, or decreed when sitting as judge, or enjoined by his edict, is admitted to be law; and these are styled Constitutions². Some of them, obviously, are personal and not to be drawn into precedents, since such is not the Emperor's intention; for any indulgence granted by him to a man for his personal merits, or any penalty specially imposed, or any unprecedented relief,

¹ There has been much debate whether the *Lex Regia* was an enactment passed once for all to regulate the extent of imperial power, or whether it was passed anew on the accession of each succeeding emperor. Ortolan thinks that the question is set at rest for ever and decided in favour of the latter view by the discovery of the *Republic* of Cicero and the *Commentaries* of Gaius. A full discussion of the matter will be found in Prichard and Nasmith's translation of Ortolan's *History of the Roman Law*, pp. 290, 291. The conclusion arrived at is that the *Lex Regia* was essentially the same for emperors in later times as for kings at the inception of the Roman state: that the king was called to the throne by popular election, but after accepting the office caused himself to be invested with his power by a *lex curiata*: "*legem de imperio suo ferebat*:"

and that in like manner each emperor was nominated by the people or the army and then invested with imperial authority by a *senatusconsultum*, which was called a *lex regia*, because under the emperors legislation emanated in appearance from the senate, although dictated to them by the prince, "*Caesare auctore*."

² *Decretum* is the name given to the emperor's decision when sitting as judge, and such *decreta* became precedents:

edictum is a general constitution published by anticipation:

rescriptum or *epistola* is the emperor's solution of a legal difficulty propounded to him by a magistrate or private person; and if by the former, preceding such magistrate's judgment and furnishing him with principles on which to base it. See Austin, *Lect. XXVIII.* p. 534, third edition.

non egreditur. aliae autem, cum generales sunt, omnes procul dubio tenent¹.

7. Praetorum quoque edicta non modicam iuris obtinent auctoritatem². haec etiam ius honorarium solemus appellare, quod qui honorem gerunt, id est magistratus, auctoritatem huic iuri dederunt. Proponebant et Aediles curules edictum de quibusdam casibus, quod edictum iuris honorarii portio est.

8. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum erat iura condere. Nam antiquitus institutum erat, ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iurisconsulti

does not go beyond the person. But other constitutions, being of general application, undoubtedly bind all men¹.

7. The Edicts of the Praetor have also no slight authority²; and to them we give the name of *jus honorarium*, because those who bear honours, that is to say the magistrates, are the authors of this branch of the law. The Curule Aediles also used to publish an edict on certain matters, and this edict forms a portion of the *jus honorarium*.

8. The Responses of the jurists are the decisions and opinions of those to whom license used to be given to expound the laws. For it was an institution of olden days that there should be professional interpreters of law, who received from

¹ Quoted from Ulpian, see D. I. 4. 1.

² The Edict of the Praetor was a compendium of rules set forth by him at the commencement of his year of office, to which he bound himself to adhere during his administration. Till the time of Julius Salvianus, who was Praetor in the reign of Hadrian, the edict was modified year by year; though the modifications, as might be expected, were not generally very sweeping, each Praetor taking his predecessor's edict as a groundwork and introducing slight alterations which circumstances suggested as beneficial. Julianus recast the edict and reduced it to a form so convenient and systematic that Hadrian decreed it should thenceforward be "perpetual," i.e. *unalterable*. Yet the term

edictum perpetuum is to be found in law-writers before the time of Hadrian; being by them used to express the fact that a Praetor did not draw up an entirely novel scheme, but took his predecessor's compilation as a starting-point, so that even then the edict was "perpetual" in the sense that the bulk of it was carried forward from year to year: it was also "perpetual" or comprehensive because set forth by anticipation and so contradistinguished from *edicta repentina*, proclamations occasioned by some special emergency. The Praetor's rules consisted in part of the *leges* and *senatusconsulta* themselves, for which he provided convenient modes of execution; partly of new regulations of his own to meet evils for which the strict civil law provided no remedy.

appellabantur¹. quorum omnium sententiae et opiniones eam auctoritatem tenebant, ut iudici recedere a responso eorum non liceret, ut est constitutum².

Caesar the right of giving opinions, and were styled jurispru-
dents¹. Their decisions and opinions, when they were unani-
mous, had such authority that the *iudex*, according to a con-
stitution², could not depart from what they laid down. *But he*
was not bound by a majority

¹ In the early times of Rome, when jurisprudence consisted in a knowledge of the *dies fasti* and *nefasti* and of the process of the *legis actiones*, i.e. of the days when legal business could or could not be transacted, and of the technicalities which hid the substance of a law-suit under a cloud of forms, the profession of a jurisprudent was limited to the patricians. Any of that order who pleased could take up the profession; almost all of them did so; and skill and learning were rewarded not by pecuniary fees but by the political support of a crowd of clients, whose legal difficulties were explained and whose suits were directed for them by their patrician patron. After the secrets of the *dies fasti* and *nefasti* and of the *legis actiones* had been divulged in the manner spoken of by Pomponius in D. 1. 2. 2. 7, the monopoly of the patricians was at an end; plebeians began to act as jurisprudents, and no one who had inclination for the pursuit was excluded from it. The *responsa prudentium* were still mere advice given to the client, to which when quoted the magistrate need pay no more attention than he thought fit.

Augustus entirely changed the character of the jurisprudents by turning them into a licensed corporation; a change referred to in the words "antiquitus constitutum erat ut essent qui publice jura interpretarentur." The magistrate was thenceforward bound to decide in accordance with the opinion of a jurisprudent, if either litigant could produce one in his favour; but we are

not told what was to be done if contradictory opinions were adduced; probably, however, the magistrate could follow whichever view he pleased. D. 1. 2. 47.

The authority of the *responsa* was not confined to the cases in which they were given, nor to the lifetime of their author; therefore by the time of Hadrian the accumulation of opinions of dead and living lawyers, frequently contradictory, was an obstacle instead of a help to the administration of justice. The rescript of that emperor quoted by Gaius (1. 7) was to the effect that if all the known dicta on a subject were in agreement, the magistrate must shape his decision accordingly; but if at variance, he could follow his own judgment; yet this, as we have already stated, was probably the usage previously, so that Hadrian merely republished the old law and did not make any innovation.

The law of Citations of Theodosius and Valentinianus was a much more thorough reform. By this enactment, dated A.D. 426, legal authority was given to the writings of five jurists only, viz. Papinian, Gaius, Paulus, Modestinus and Ulpian, and by implication taken from those of all other jurists living or dead, with a saving in the latter instance of opinions quoted by any of the selected sages. From that time therefore the jurisprudents in general lost their official character; their advice carried only the weight due to their personal reputation, and was in no way binding on the magistrate.

² Sc. of Hadrian, Gaius 1. 7.

9. Ex non scripto ius venit quod usus comprobavit. nam diuturni mores consensu utentium comprobati legem imitantur¹. (10.) Et non ineleganter in duas species ius civile distributum videtur. Nam origo eius ab institutis duarum civitatum, Athenarum scilicet et Lacedaemonis, fluxisse videtur. in his enim civitatibus ita agi solitum erat, ut Lacedaemonii quidem magis ea quae pro legibus observarent memoriae mandarent; Athenienses vero ea quae in legibus scripta reprehendissent custodirent².

11. Sed naturalia quidem iura quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent³; ea vero quae ipsa

9. The unwritten law rests upon the sanction of usage. For long-continued customs approved by the consent of those practising them resemble law¹. 10. Nor does it seem to be without reason that the civil law is subdivided into two branches. For it appears to be derived originally from the institutions of two states, viz., Athens and Lacedaemon; inasmuch as the usual course of proceeding in these states was for the Lacedaemonians to entrust to memory what they observed as laws, whilst the Athenians, on the contrary, paid heed to the matter they had set down in writing in their statutes².

11. The natural laws which are observed by all nations alike, being appointed by a Divine Providence, always remain firm and immutable³: but those laws which each state esta-

¹ They resemble law, but still they are not law: for in the first place a law proceeds from a determinate author, viz. the sovereign of the state, whereas a rule of custom is established by an indeterminate body, viz. the bulk of a society: and in the second place a law proper has a definite sanction, so that he who disregards it knows what he may expect to suffer, whereas a rule of custom has no specified sanction and he who disregards it expects to suffer some evil, but he knows not what: yet the two are alike in one essential particular, that through fear of impending evil those whom the law-

giver or the community have the ability to injure are constrained to uniformity of behaviour. See Austin, *Lect.* v. When the state adopts a custom and enforces it by a legal sanction, it thenceforward of course is a perfect law.

² This derivation of the laws of Rome from those of Athens and Sparta is of course pure matter of imagination, without historical groundwork.

³ The laws of nature are immutable, as Justinian says; but the laws of nature are not those observed by all nations. The laws observed by all nations, the *jus gentium*, are in the

sibi quaeque civitas constituit saepe mutari solent, vel tacito consensu populi, vel alia postea lege lata.

12. Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. Ac prius de personis videamus¹. nam parum est ius nosse, si personae quarum causa statutum est ignorentur.

TIT. III. DE IURE PERSONARUM.

Summa itaque divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.

1. Et libertas quidem est, ex qua etiam liberi vocantur,

blishes for itself are liable to frequent changes, either through the tacit consent of a people, or through another law being subsequently enacted.

12. The whole body of law which we use relates either to persons, or to things, or to actions. And first let us consider about persons¹; for it is of little service to know the law if we do not know the persons in view of whom it has been enacted.

TIT. III. ON THE LAW OF PERSONS.

The primary division then of the law of persons is this, that all men are either free or slaves.

1. And freedom, for possessing which men are called free,

main founded on the law of nature, as we have already explained, but contain an admixture of rules based on selfish prejudices. Moreover, as prejudices and prepossessions vary according to time and circumstances, the *jus gentium* is not immutable. The true statement therefore would be: "the natural law is immutable, and if nations made their morality (*jus gentium*) conform to it, that would be immutable also; but as they do not do so thoroughly, the *jus gentium* is liable to fluctuations, though these fluctuations are not so numerous or important as the changes through which any system of municipal law

(*jus civile*) is wont to pass."

¹ For a discussion of the word "person," and the distinction between natural and legal persons, see Austin's *Jurisprudence*, Lect. XII. Law deals with the rights and duties originating from the subordination of ranks which is essential to settled society,—this portion is the law of persons: law treats also of the rights of property, and herein all the members of a society are regarded as equal—this is the so-called law of things: law treats of the remedies in case of breach of obligations of either of the species just enumerated; this is the law of actions or procedure.

naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur. (2.) Servitus autem est constitutio iuris gentium, qua quis dominio alieno contra naturam subiicitur¹. (3.) Servi autem ex eo appellati sunt, quod imperatores captivos vendere iubent, ac per hoc servare, nec occidere solent. qui etiam mancipia dicti sunt, quod ab hostibus manu capiuntur.

4. Servi autem aut nascuntur, aut fiunt. nascuntur ex ancillis nostris. fiunt aut iure gentium, id est ex captivitate; aut iure civili, cum homo liber maior viginti² annis ad pretium participandum sese venundari passus est.

5. In servorum condicione nulla differentia est. In liberis multae differentiae sunt: aut enim ingenui sunt, aut libertini.

is a natural capacity of doing what each man pleases to do, saving only anything prevented by force or by law. 2. But servitude is a creation of the law of nations, by which one person is subjected to the power of another, contrary to nature¹.

3. Slaves get their name of *servi* from the fact that generals order the sale of their captives, and therefore usually save (*servant*) and do not kill them. They are also called *mancipia*, because they are taken from the enemy by the hand.

4. Slaves then are such either by birth or by men's making. They are born to slavery when they are children of our female slaves; they are made slaves either by virtue of the law of nations, that is to say through captivity, or by the civil law, when a free man above the age of twenty² has allowed himself to be sold, in order to share his own price.

5. In the condition of slaves there are no gradations. But amongst free men there are many gradations; for they are either *ingenui* or *libertini*.

¹ II. 3. The paragraphs numbered 1, 2, 3 are quotations from Florentinus in D. 1. 5. 4.

² See D. 1. 5. 5. 1, where Marcianus makes the same statement with regard to a man above *twenty-five* years of age; and twenty-five no doubt is the correct number, *quinque*

having been accidentally omitted either by Justinian when compiling his work, or by some copyist. Twenty-five, as is well known, was the age of majority according to Roman law. See D. 40. 13. 1 and 3 on the subject of voluntary submission to slavery for a price.

TIT. IV. DE INGENUIS.

Ingenuus est, qui statim ut natus est liber est; sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino, altero ingenuo. sed etsi quis ex matre libera nascatur, patre servo, ingenuus nihilominus nascitur; quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est. Sufficit autem liberam fuisse matrem eo tempore quo nascitur, licet ancilla conceperit. et ex contrario si libera conceperit, deinde ancilla facta pariat, placuit eum qui nascitur liberum nasci, quia non debet calamitas matris ei nocere qui in utero est¹. ex his et illud quaesitum est, si ancilla praegnans manumissa sit, deinde ancilla postea facta pepererit, liberum an servum pariat? et Marcellus probat liberum nasci: sufficit enim ei qui in ventre est liberam matrem vel medio tempore habuisse. quod et verum est.

TIT. IV. ON INGENUI.

An *ingenuus* is one who is free at the very moment of his birth; whether born in matrimony from two freeborn persons, or from two persons who have been made free, or from one person made free and another born free; and even if a child be born of a free mother, but with a slave for father, still he is freeborn; just as a child is if born from a free mother but an unknown father, because conceived in prostitution. And it is enough if the mother be free at the time of the child's birth, even though she were a slave at the time of conception; and conversely if she conceive whilst free, and then bear her child after being reduced to slavery, it is ruled that the child is freeborn, because the misfortune of the mother ought not to prejudice the unborn offspring¹. Hence this question has been started: supposing a female slave be manumitted whilst pregnant, and subsequently bear a child after being a second time reduced to slavery, is that child free or slave? and Marcellus maintains that he is born free, for it is enough for the unborn child to have had a free mother even at an intermediate time; and this statement we hold correct.

¹ See Marcianus, in D. 1. 5. 5. 2.

1. Cum autem ingenuus aliquis natus sit, non officit illi in servitute fuisse et postea manumissum esse. saepissime enim constitutum est natalibus non officere manumissionem¹.

TIT. V. DE LIBERTINIS.

Libertini sunt, qui ex iusta servitute manumissi sunt. Manumissio autem est datio libertatis. nam quamdiu quis in servitute est, manui et potestati suppositus est, et manumissus liberatur potestate. Quae res a iure gentium originem sumsit: utpote cum iure naturali omnes liberi nascerentur, nec esset nota manumissio, cum servitus esset incognita. sed postea quam iure gentium servitus invasit, secutum est beneficium manumissionis. et cum uno naturali nomine homines appellaremur, iure gentium tria genera hominum esse coeperunt,

1. When any one is born free, the fact of his undergoing slavery and being afterwards manumitted does not affect his status, for it has been repeatedly laid down that manumission does no prejudice to the rights of birth¹.

TIT. V. ON LIBERTINI.

Libertini are those who have been manumitted from a servitude recognised by the law; and manumission is the gift of liberty; for so long as a man is in slavery he is subject to hand (*manus*) and power, and when manumitted is freed from power. This process was derived from the law of nations; since according to the law of nature all persons were born free, and manumission was not known at the time when slavery was unknown. But after slavery was introduced by the law of nations the remedy of manumission followed; and whereas we were all called by one natural name, viz., *men*, there began in consequence of the law of nations to be three varieties of

¹ He would undoubtedly be a *libertinus* if manumitted after being reduced to slavery in accordance with the law; but the meaning of the present passage is, that if he be erroneously supposed a slave and be manumitted, the discovery of the

mistake reinstates him in his true condition of *ingenuus*: in such case he has never really been a slave, so that the manumission is altogether void and does not prejudice him. C. 7. 14. 2.

liberi, et his contrarium servi, et tertium genus libertini qui desiderant esse servi. (1.) Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis, aut vindicta, aut inter amicos, aut per epistolam, aut per testamentum, aut aliam quamlibet ultimam voluntatem¹. Sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus quam nostris constitutionibus introducti sunt. (2.) Servi vero a dominis semper manumitti solent: adeo, ut vel in transitu²

men;—*freemen*; their opposite, *slaves*; and a third class, *freedmen*, who had ceased to be slaves. 1. This manumission is effected in various ways: either in the face of Holy Church according to imperial constitutions, or by *vindicta*, or before our friends, or by letter, or by testament or any other mode of expressing our last wishes¹. There are besides many other ways in which liberty can be conferred on a slave, introduced by constitutions either of old date or of our own enactment. 2. Further, slaves can be manumitted by their masters at any time; in fact they can be manumitted “in passing,” for

¹ In the time of Gaius there were only three regular modes of manumission, one or other of which had to be employed if it were desired that the freedman should be a full *civis Romanus*: these were *vindicta*, *census* or *testamentum*, Gaius I. 17. The process in manumission by *vindicta* was for a claim to be made by some free person as *adsertor libertatis*, who in the Praetor's presence grasped the slave with one hand and with the other laid on him a rod, *vindicta* or *festuca*; the proprietor thereupon relinquished the grasp he had hitherto maintained upon the slave, *manumisit*, and the Praetor, taking this for a confession of the justice of the adsertor's appeal, pronounced the slave free.

Manumission by *census* was a thing of the past even in Ulpian's time, as we see from the description he gives in I. 8. The process was simply for the master to request the censor at his quinquennial visitation to enter the slave's name on the roll

of freemen.

When the irregular form of manumission was employed, i.e. a mere declaration of the gift of freedom in the presence of witnesses, *manumissio inter amicos*, the liberty conferred was in Gaius' day of the inferior grade styled *Latinitas*. But Justinian, as he himself informs us in I. 5. 3, abolished the lower varieties of freedom, and made all manumitted slaves full *cives Romani*. 4

The other methods of manumission named in the text require but little comment. That in *sacrosanctis ecclesiis* was invented by Constantine and is described in the Code (I. 13). The gift *per epistolam* was contained in a letter from the master to the slave; that *per testamentum* aut *per aliam quamlibet ultimam voluntatem* was by bequest in a formal will, *testamentum*, or an informal will, *codicilli*; as to which see II. 25.

² The Praetor's contentions jurisdiction was exercised in court only, *pro tribunali*, but his voluntary juris-

manumittantur, veluti cum Praetor aut Proconsul aut Praeses¹ in balneum vel in theatrum eat.

3. Libertinorum autem status tripartitus antea fuerat. nam qui manumittebantur, modo maiorem et iustam libertatem consequiebantur, et fiebant cives Romani; modo minorem, et Latini ex lege Iunia Norbana fiebant; modo inferiorem, et fiebant ex lege Aelia Sentia dediticiorum numero. Sed dediticiorum quidem pessima condicio iam ex multis temporibus in desuetudinem abiit; Latinorum vero nomen non frequentabatur: ideoque nostra pietas omnia augere et in meliorem statum reducere desiderans, in duabus constitutionibus hoc emendavit et in pristinum statum reduxit, quia et a primis urbis Romae cunabulis una atque simplex libertas compete-
bat, id est eadem quam habebat manumissor, nisi quod scilicet libertinus sit qui manumittitur, licet manumissor ingenuus sit. et dediticios quidem per constitutionem²

example, when the Proconsul or Praeses¹ is on his way to the bath or the theatre.

3. The status of freedmen at one time comprehended three gradations. For manumitted persons obtained in some instances full and legitimate freedom, and became Roman citizens; in other instances they obtained an inferior kind, and became Latins under the Lex Junia Norbana; in others one lower still, and were in the category of *dediticii* under the Lex Aelia Sentia. But the lowest class, that of the *dediticii*, long since disappeared, and the name of Latins had become of unfrequent occurrence. Therefore our benevolence, desirous of improving everything and bringing it into a happier state, has reformed this matter, and restored it to its original footing; *in two* for in the early infancy of Rome one and only one liberty *counts* was possible, viz., the same which the manumittor himself had, save only that the manumitted slave was a *libertinus*, whilst he who manumitted was an *ingenuus*. So we have abolished *dediticii* by a constitution², published amongst those decisions

diction could be set in motion anywhere, and manumission is obviously a voluntary matter.

¹ The governor of a province was styled *praeses*, which therefore is a general title, comprehending both

proconsules and *propraetores* (or *legati*). The distinction between these officers is explained in our note on Gaius I. 6.

² C. 7. 5 and 6.

nostram expulimus quam promulgavimus inter nostras decisiones, per quas, suggerente nobis Triboniano, viro excelso, Quaestore, antiqui iuris altercationes placavimus; Latinos autem Iunianos, et omnem, quae circa eos fuerat, observantiam, alia constitutione per eiusdem Quaestoris suggestionem correximus, quae inter imperiales radiat sanctiones. et omnes liberos nullo, nec aetatis manumissi, nec domini manumissoris, nec in manumissionis modo discrimine habito, sicuti antea observabatur, civitate Romana donavimus; multis additis modis, per quos possit libertas servis cum civitate Romana, quae sola in praesenti est, praestari¹.

of ours, wherein, at the suggestion of our excellent Quaestor, Tribonian, we have laid to rest the disputed points of the ancient law; and by another constitution, also suggested by the same Quaestor, and amongst the brightest of our imperial enactments, we have reformed the (status of the) Junian Latins and all the rules relating to them, and have conferred Roman citizenship on every freedman, making no account either of the age of the manumitted slave, or the title of the manumittor, or the method of manumission, as used to be the case; besides which, we have added various new processes whereby a slave can obtain the only liberty now existent, viz. that accompanied by Roman citizenship¹.

¹ Under the old law manumission would only be valid (1) if the owner held the slave by full title, *ex jure Quiritium* and not merely *in bonis*; as to which distinction see Gaius II. 44, and (2) if he employed one of the three regular processes, viz. *vindicta*, *census* or *testamentum*. These were all public acts; for it is obvious such was the character of manumission by *vindicta* or *census*, and it must be borne in mind that anciently a testament could not be made except with consent of the people assembled in *comitia*. (See II. 10. 1.) A private manumission, one *inter amicos*, was originally revocable, but as time went on the Praetor began to protect the *persons* of those on whom liberty was informally be-

stowed, treating them as resident foreigners, *peregrini* (Ulp. I. 10), but their *property* was only secured to them for life, and on their death reverted to their former masters (Gaius III. 56). Such persons were said to be *in forma libertatis*.

The *Lex Aelia Sentia*, A.D. 4, added further conditions for full *civitas* in the manumitted man, viz. that he himself should be above 30 years of age and his master above 20, unless satisfactory cause for the manumission were proved before the Council (Gaius I. 18). The same *lex* also invented the inferior freedom of the *dediticii*, about which we need not say more, for full information on the subject is to be found in Gaius I. 13—15.

TIT. VI. QUI, QUIBUS EX CAUSIS, MANUMITTERE
NON POSSUNT.

Non tamen cuicumque volenti manumittere licet. nam is qui in fraudem creditorum manumittit, nihil agit: quia lex Aelia Sentia impedit libertatem¹. (1.) Licet autem domino qui solvendo non est testamento servum suum cum libertate heredem instituere, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is qui scriptus est qualibet ex causa heres non extiterit². idque eadem lege Aelia Sentia pro-

TIT. VI. WHAT PERSONS CANNOT BE MANUMITTED AND WHY.

The law, however, does not allow every one to manumit who chooses so to do. For he who manumits with the view of defrauding his creditors does a void act, since the Lex Aelia Sentia bars the gift of freedom¹. 1. But a master who is insolvent may in his testament appoint a slave of his own to be his heir with a gift of freedom; so that the slave will become free and his sole and "necessary" heir, provided no one else become heir under the same testament, either because no one else is appointed heir, or because the person appointed fails from some cause or other to become heir². This was enacted, and on good grounds, by the aforementioned Lex Aelia Sentia:

In A.D. 19 the *Lex Junia Norbana* was enacted, which conferred on those privately manumitted an intermediate grade of citizenship, and invented for them the name of *Latini Juniani*. They were no longer merely protected by the Praetor, but were thenceforth recognized by the statute law, by which also their rights and privileges were defined. These are sufficiently explained in App. A of our edition of Gaius, and to it therefore we refer the reader.

The *Lex Aelia Sentia* had further provided a number of methods whereby those merely *in forma libertatis* could be raised to *civitas* (Gaius I. 28—30, 32, 35; Ulpian III.); and these

conditions after the passing of the *Lex Junia Norbana* applied to the promotion of Junian Latins into perfect citizens, unless their Latinity was occasioned by defect of age: but a *senatus consultum* of A.D. 75 extended the benefits of these *leges* to all Junian Latins, even when their Latinity was for defect of age in the manumittor or manumitted.

¹ Gaius I. 37.

² For the meaning and derivation of the term "heres necessarius" see II. 19. 1, and for the principle of substitution of heirs alluded to in the latter part of the paragraph read II. 15.

visum est, et recte: valde enim prospiciendum erat, ut egentes homines, quibus alius heres extiturus non esset¹, vel servum suum necessarium heredem habeant qui satisfactorius esset creditoribus, aut hoc eo non faciente creditores res hereditarias servi nomine vendant, ne iniuria defunctus afficiatur. (2.) Idemque iuris est, etsi sine libertate servus heres institutus est. quod nostra constitutio² non solum in domino qui solvendo non est, sed generaliter constituit, nova humanitatis—ut ex ipsa scriptura institutionis etiam libertas ei competere videatur—cum non est verisimile, eum quem heredem sibi elegit, si praetermiserit libertatis dationem, servum remanere voluisse, et neminem sibi heredem fore. (3.) In fraudem autem creditorum manumittere videtur, qui vel iam eo tempore quo manumittit solvendo non est, vel qui datis libertatibus desiturus est solvendo esse. praevaluisse tamen videtur, nisi animum quoque fraudandi manumissor habuit, non impediri libertatem,

for it was most necessary to provide that needy men, who were not likely to have any one else as heir¹, should either have in their slave a “necessary” heir to make payment to their creditors, or that the creditors in case of his failure to do this might sell the property attached to the inheritance in the name of the slave, and so the dead man should suffer no disgrace. 2. The law is the same even when the slave has been instituted heir without mention of his freedom;—a rule which a constitution² of ours has established in a spirit of humanity hitherto unknown, and that too not only in the case of an insolvent master but universally,—so that from the mere statement of the slave’s institution a gift of freedom to him is to be presumed,—since it is not likely that a man, even though he may have omitted the gift of freedom, intended the heir he has appointed to remain a slave, and himself consequently to have no heir. 3. A person is considered to manumit in fraud of his creditors when he is either insolvent at the time of the manumission, or will cease to be solvent through the gifts of liberty. But the principle seems to be established that unless the manumittor had further the intent of defrauding, the gift of

¹ The heir, if he accepted the inheritance, was liable to the debts of the deceased, even though they ex-

ceeded the amount he received.

² C. 6. 27. 5.

quamvis bona eius creditoribus non sufficiant: saepe enim de facultatibus suis amplius quam in his est sperant homines. itaque tunc intellegimus impediri libertatem, cum utroque modo fraudantur creditores, id est et consilio manumittentis et ipsa re, eo quod bona non suffectura sunt creditoribus.

4. Eadem lege Aelia Sentia domino minori viginti annis non aliter vindicta manumittere permittitur, quam si apud consilium iusta causa manumissionis adprobata fuerit¹. (5.) Iustae autem manumissionis causae sunt: veluti si quis patrem aut matrem aut filium filiamve aut fratrem sororemve naturales² aut paedagogum aut nutricem educatoremve aut alumnum alumnamve aut collactaneum manumittat, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, dum tamen intra sex menses uxor ducatur, nisi iusta causa impediatur; et qui manumittitur procuratoris habendi gratia ne minor septem

liberty is not barred, even though his goods be insufficient to pay his creditors: for men often hope greater things of their property than it warrants. Therefore we consider a gift of liberty to be invalidated when the creditors are defrauded in each way, namely both in the intention of the manumittor and in the actual fact of the goods being insufficient to meet the claims of the creditors.

4. By the same Lex Aelia Sentia a master under twenty years of age is not allowed to manumit by *vindicta* except a lawful cause of manumission has been proved before the council¹. 5. Lawful causes of manumission are, for instance, if a man manumit his own² father or mother, son or daughter, brother or sister, or his personal attendant, nurse, foster-father, foster-child male or female, foster-brother, a male slave in order that he may have him as agent, or a female slave in order that he may marry her, provided only he take her to wife within six months, no lawful cause standing in the way; and provided that a slave manumitted in order to be an agent

¹ We have adopted the arrangement of the text suggested by Niebuhr and Goschen, although the manuscripts as a rule have the collocation, "non aliter manumittere permittitur quam si vindicta etc.," but this may be objected to both on grammatical grounds and also because we know that a master could

manumit in other forms than by *vindicta*, and that he could give Latinity without application to the Council. Gaius 1. 17. As to the constitution of "the Council," see Gaius 1. 20.

² *Naturales* in contradistinction to *adoptivi*.

et decem annis manumittatur. (6.) Semel autem causa adprobata¹, sive vera sive falsa sit, non retractatur².

7. Cum ergo certus modus manumittendi minoribus viginti annis dominis per legem Aeliam Sentiam constitutus sit, eveniebat, ut qui quatuordecim annos aetatis expleverit, licet testamentum facere possit, et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annis viginti, libertatem servo dare non poterat. quod non erat ferendum, si is, cui tutorum bonorum in testamento dispositio data erat, uni servo libertatem dare non permittebatur: quare non similiter ei, quemadmodum alias res, ita et servos suos in ultima voluntate disponere quemadmodum voluerit, permittimus, ut et libertatem eis possit praestare? sed cum libertas inaestimabilis est, et propter hoc ante vicensimum aetatis annum antiquitas libertatem servo dare prohibebat: ideo nos, mediam quodammodo viam eligentes, non aliter minori viginti annis libertatem in testamento dare servo suo concedimus, nisi septimum et decimum annum impleverit et octavum decimum teti-

be not under the age of seventeen years. 6. But if a reason be once approved¹, whether it be true or false, it is not afterwards set aside².

7. Since then a certain limitation of manumitting was imposed by the Lex Aelia Sentia on masters under twenty years of age, the result was that one who had completed his fourteenth year, although he could make a testament and in it institute an heir to himself and leave legacies, yet could not, if still under twenty years of age, give liberty to a slave. But it seemed intolerable that a person who was allowed the disposition of all his goods by testament should not be permitted to give liberty to a single slave: why should we not suffer him by his last will to dispose of his slaves in like manner as of his other property, according to his pleasure, so as to be able also to give them liberty? Still as liberty is beyond value, and accordingly the men of old forbade any one under twenty to give it to a slave, we therefore take a kind of middle course and do not allow a person under twenty years of age to confer freedom on his slave by testament, except he has completed his seventeenth

¹ Sc. by the Council.

² At any rate not if five years have elapsed, see D. 40. 4. 29.

gerit. cum enim antiquitas huiusmodi aetati et pro aliis postulare concessit¹, cur non etiam sui iudicii stabilitas ita eos adiuvare credatur, ut et ad libertates dandas servis suis possint provenire?

TIT. VII. DE LEGE FURIA CANINIA SUBLATA.

Lege Furia Caninia certus modus constitutus erat in servis testamento manumittendis². quam, quasi libertatibus impedi-entem et quodammodo invidam, tollendam esse censuimus, cum satis fuerat inhumanum, vivos quidem licentiam habere totam suam familiam libertate donare, nisi alia causa impedi- at libertati, morientibus autem huiusmodi licentiam adimere.

TIT. VIII. DE HIS QUI SUI VEL ALIENI IURIS SUNT.

Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt³, quaedam alieno iuri subiectae sunt.

year and entered upon his eighteenth. For since the ancients allowed people of this age to plead, even on behalf of others¹, why should not the soundness of their judgment be supposed to enable them to proceed also to the conferring of liberty upon their slaves?

TIT. VII. ON THE REPEAL OF THE LEX FURIA CANINIA.

As the Lex Furia Caninia established a strict limitation of the number of slaves who could be manumitted by testament², we have thought fit that it should be abolished, because it interfered with the bestowal of freedom and was in some respects an odious law: for it seemed thoroughly unreasonable that living persons should have the power to set free their whole household, unless some other cause interfered with the gift of freedom, whilst we took the same privilege from the dying.

TIT. VIII. ON THOSE WHO ARE SUI JURIS OR ALIENI JURIS.

Now follows another division of the law of persons. For some persons are *sui juris*³, some are subject to the *jus*

¹ D. 3. 1. 1. 3.

² As to the provisions of this *lex* see Gaius I. 42.

³ Sui juris sunt familiarum suorum principes. Ulpian IV. 1.

rursus earum, quae alieno iuri subiectae sunt, aliae in potestate parentum, aliae in potestate dominorum sunt. videamus itaque de his quae alieno iuri subiectae sunt: nam si cognoverimus quae istae personae sunt, simul intellegemus quae *sui iuris* sunt.

Ac prius dispiciamus de his quae in potestate dominorum sunt.

1. In potestate itaque dominorum sunt servi. quae quidem potestas iuris gentium est¹: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse, et quodcumque per servum acquiritur, id domino acquiritur². (2.) Sed hoc tempore nullis hominibus qui sub imperio nostro sunt licet sine causa legibus cognita et supra modum in servos suos saevire. Nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri iubetur, quam qui servum alienum occiderit³. Sed et

(authority) of another. Of those persons again who are subject to the authority of another, some are in the *potestas* of their ascendants, some in the *potestas* of their masters. Let us consider then about those who are subject to another's authority: for if we discover who these persons are, we shall at the same time understand who are *sui juris*.

And first let us consider about those who are in the *potestas* of their masters.

1. Slaves then are in the *potestas* of their masters. Which *potestas* is a creation of the *jus gentium*¹: for we may perceive that amongst all nations alike masters have the power of life and death over their slaves. Also whatever is acquired by means of a slave, is acquired for the master². 2. But at the present day no persons who are under our sway are allowed to punish their slaves without a reason recognized by the laws, or in an outrageous manner. For by a constitution of the late emperor Pius Antoninus, he who kills his own slave without cause, is ordered to be punished as severely as he who kills the slave of another³. The extravagant cruelty of masters is further

¹ 1. 2. 2.

² This passage is taken almost verbatim from Gaius I. 48—53. It will be noticed that it is only the power of life and death which is

described as a creation of the *jus gentium*, the prohibition of property to a slave being a rule of the civil law. See our note on Gaius I. 52.

³ He was amenable to the penal-

maior asperitas dominorum eiusdem Principis constitutione coërcetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad aedem sacram vel ad statuas Principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos bonis condicionibus vendere, ut pretium dominis daretur. et recte: expedit enim reipublicae, ne quis rem suam male utatur. cuius rescripti, ad Aelium Marcianum emissi, verba haec sunt¹: Dominorum quidem potestatem in suos servos illibatam esse oportet, nec cuiquam hominum ius suum detrahi. sed dominorum interest, ne auxilium contra saevitiam vel famem vel intolerabilem iniuriam denegetur his qui iuste deprecantur. ideoque cognosce de querelis eorum qui ex familia Iulii Sabini ad statuam confugerunt; et si vel durius habitos quam aequum est, vel infami

restrained by another constitution of the same emperor. For when consulted by certain governors of provinces with regard to those slaves who flee for refuge to a holy temple or to the statues of the Emperors, he ordered that if the cruelty of the masters be proved to be beyond endurance, they shall be compelled to sell their slaves on fair terms, the price being given to the owners. And this rule is just; for it is a matter of public concern that no one should make an evil use of his property. The words of the edict referred to, which was sent to Aelius Marcianus, are as follows¹: "The power of masters over their slaves ought certainly to suffer no infringement, nor ought any man to be deprived of his right: yet it is to the interest of the masters themselves that there should be no denial of relief to those who implore it on just grounds against cruelty, or starvation, or other intolerable wrong. Therefore examine into the complaints of those slaves of Julius Sabinus who have fled to the statue: and if you discover that they have been treated with more severity than they deserve, or that they have undergone outrageous wrong, order them to be sold,

ties of the *Lex Cornelia de Sicariis*. See D. 48. 8. 1. 2 and D. 48. 8. 3. 5. In the passage last quoted, we are informed that the punishment was originally deportation to an island in all cases; but that subsequently death by exposure to wild beasts

was the sentence awarded to all but persons of high degree, the latter remaining liable to deportation only.

¹ Quoted from a passage of Ulpian in D. 1. 6. 2.

iniuria affectos cognoveris, veniri iube, ita ut in potestatem domini non revertantur. qui Sabinus, si meae constitutioni fraudem fecerit, sciet me admissum severius executurum.

TIT. IX. DE PATRIA POTESTATE.

In potestate nostra sunt liberi nostri quos ex iustis nuptiis procreaverimus. (1.) Nuptiae autem sive matrimonium¹ est viri et mulieris coniunctio, individuum consuetudinem vitae continens². (2.) Ius autem potestatis quod in liberos habemus proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus³.

3. Qui igitur ex te et uxore tua nascitur in tua potestate est. item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aequae in tua sunt potestate, et pronepos et

in such wise that they do not return into the power of their master. And if he evade my constitution, he shall discover that I will severely punish his offence."

TIT. IX. ON PATRIA POTESTAS.

Our children also whom we have begotten in lawful marriage are in our *potestas*. 1. Now marriage or matrimony¹ is the union of man and woman, creating an indivisible community of life². 2. The right of *potestas* which we have over our children is peculiar to Roman citizens, for there are no other men who have such *potestas* over their children as we have³.

3. A child then who is born from you and your wife is in your *potestas*. So too is one born from your son and his wife in your *potestas*—that is, your grandson or granddaughter; in like manner your great-grandson and great-granddaughter, and

¹ The word *nuptiae* strictly speaking denotes the ceremonies by which a marriage was contracted: and *matrimonium* the actual status of marriage.

² There was a community of status, but not of property. The wife took her husband's rank, but the husband (unless the marriage was

accompanied by *conventio in manum*) did not acquire the wife's property, nor had she any claims upon his.

³ Gaius on the contrary says that the Galatians have the same regulations on this subject as the Romans (i. 55); and we may quote in corroboration St Paul's Epistle to the Galatians, iv. 1.

proneptis, et deinceps ceteri. Qui tamen ex filia tua nascitur in tua potestate non est, sed in patris eius¹.

TIT. X. DE NUPTIIS².

Iustas autem nuptias inter se cives Romani contrahunt, qui secundum praecepta legum coeunt, masculi quidem puberes, feminae autem viripotentes, sive patresfamilias sint sive filii-familias; dum tamen filiifamilias et consensum habeant parentum, quorum in potestate sunt³. nam hoc fieri debere, et civilis et naturalis ratio suadet in tantum, ut iussum parentis praecedere debeat. unde quaesitum est, an furiosi filia nubere, aut furiosi filius uxorem ducere possit? cumque super filio variabatur⁴,

all others more remote; but the child of your daughter is not in your *potestas*, but in that of his father¹.

TIT. X. ON MARRIAGE².

Roman citizens are joined together in lawful marriage when they unite themselves according to the rules of law, the males having reached the time of puberty, and the females being of the age of child-bearing, whether they be heads of families or subject-members of families; provided only the subject-members of families have in addition the consent of the ascendants in whose *potestas* they are³; for both civil and natural law so strongly insist on this being needful, that the authorization of the ascendant ought further to be precedent. Hence it used to be debated whether the daughter of a madman could be married, or the son of a madman take a wife; and since opinions differed as to the son⁴, we have ourselves published a decision whereby the son

¹ As to the rights comprised in *potestas* see App. A.

² A short historical sketch of the Roman law of marriage is given in App. B.

³ D. 23. 2. 2 and 3.

⁴ It had been settled before Justinian's time that the daughter could marry; for by marriage she went out of her father's family and so relieved him of a burden. The case of the son was different: for if he had been allowed to marry without his father's

consent, the father on recovering his reason would have found himself liable to support and make testamentary provision for the offspring of the marriage, as they would have been under his *potestas*, and he would have been under the same obligation as to the wife also, if by being married with *conventio in manum* she had acquired the rights of a daughter in relation to her husband, and therefore those of a granddaughter in relation to his father. See II. 13.

nostra processit decisio, qua permissum est, ad exemplum filiae furiosi filium quoque posse et sine patris interventu matrimonium sibi copulare secundum datum ex constitutione modum¹.

✓ 1. Ergo non omnes nobis uxores ducere licet. nam quarundam nuptiis abstinendum est².

Inter eas enim personas quae parentum liberorumve locum inter se obtinent nuptiae contrahi non possunt, veluti inter patrem et filiam, vel avum et neptem, vel matrem et filium, vel aviam et nepotem, et usque ad infinitum. et si tales personae inter se coierint, nefarias atque incestas nuptias contraxisse dicuntur. Et haec adeo ita sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio iungi, in tantum, ut etiam dissoluta adop-

of a madman is allowed, in like manner as the daughter of a madman, to marry without his father's intervention, according to a method appointed by our constitution¹.

1. Again, we cannot marry any woman we please, for there are some from marriage with whom we must abstain².

Thus between persons who stand to one another in the relation of ascendants and descendants marriage cannot be contracted; for instance, between father and daughter, or grandfather and granddaughter, or mother and son, or grandmother and grandson, and so for all further degrees; and if such persons cohabit, they are said to have contracted an unholy and incestuous marriage. And these rules hold so universally, that although they enter into the relation of ascendants and descendants by adoption, they cannot be united in marriage; and even after the adoption has been dissolved, the same rule

¹ C. 5. 4. 25.

² The rules on the subject of prohibited degrees may be thus summarized:

(a) Ascendants and descendants can in no case marry.

(b) Collaterals within the fourth degree cannot marry.

(c) If marriage be impossible with any person's son or daughter, so also is it with the grandson or granddaughter of that same person.

(d) The relationship created by adoption is during its continuance as

complete a bar as the relationship of blood.

(e) The relationship created by adoption is no bar after the dissolution of the adoption, except when it has for a time put the parties in the position of ascendant and descendant.

(f) Affinity bars marriage with ascendants or descendants of a former consort, and with their collaterals up to the second degree, i.e. a deceased wife's sister or deceased husband's brother. C. 5. 5. 5.

tione idem iuris maneat: itaque eam quae tibi per adoptionem filia aut neptis esse coeperit non poteris uxorem ducere, quamvis eam emancipaveris¹.

2. Inter eas quoque personas quae ex transverso gradu cognationis iunguntur est quaedam similis observatio, sed non tanta. Sane enim inter fratrem et sororem nuptiae prohibitaе sunt, sive ab eodem patre eademque matre nati fuerint, sive ex alterutro eorum². sed si qua per adoptionem soror tibi esse coeperit, quamdiu quidem constat adoptio, sane inter te et eam nuptiae consistere non possunt; cum vero per emancipationem adoptio dissoluta sit, poteris eam uxorem ducere; sed et si tu emancipatus fueris, nihil est impedimento nuptiis. et ideo constat: si quis generum adoptare velit, debere eum ante filiam suam emancipare; et si quis velit nurum adoptare, debere eum ante filium emancipare³. (3.) Fratris vel sororis filiam uxorem ducere non licet⁴. sed nec neptem fratris vel

stands; therefore you cannot marry a woman who has once been your daughter or granddaughter by adoption, even though you have emancipated her¹.

2. Also between persons who are related collaterally there is a rule of like character, but not so stringent. Marriage is absolutely forbidden between a brother and a sister, whether they be born from the same father and the same mother, or from one or other of them². But if a woman become your sister by adoption, then, so long as the adoption stands, marriage certainly cannot subsist between you and her: but when the adoption has been dissolved by emancipation, you can marry her: and so also if you have been emancipated, there is no bar to the marriage. Hence it is a rule that if any one wish to adopt his son-in-law, he ought first to emancipate his daughter; and if any one wish to adopt his daughter-in-law, he ought first to emancipate his son³. 3. It is not lawful to marry the daughter of your brother or sister⁴; neither can any

¹ This paragraph and that which follows are copied verbatim from Gaius I. 59 and 60. The same doctrines are stated in Ulpian v. 6.

² Sc. whether they be of the whole or the half blood.

³ See Gaius in D. 23. 2. 17. 1. The process of *emancipation* is explained in I. 12. 6.

⁴ An anomalous exception in favour of marriage with a brother's daughter had been introduced by Clau-

sororis ducere quis potest, quamvis quarto gradu sint: cuius enim filiam uxorem ducere non licet, eius neque neptem permittitur¹. eius vero mulieris quam pater tuus adoptavit filiam non videris impediri uxorem ducere, quia neque naturali neque civili iure tibi coniungitur². (4.) duorum autem fratrum vel sororum liberi, vel fratris et sororis, iungi possunt. (5.) item amitam, licet adoptivam, uxorem ducere non licet, item materteram: quia parentum loco habentur. qua ratione verum est, magnam quoque amitam et materteram magnam prohiberi uxorem ducere.

one marry the granddaughter of his brother or sister, although they are four degrees removed from him: for whenever you cannot marry the daughter of any person, it is also forbidden that you should marry his granddaughter¹. But you are not considered to be debarred from marrying the daughter of a woman whom your father has adopted, because she is not connected with you, either by natural or civil law². 4. The children of two brothers, or of two sisters, or of a brother and a sister can be united. 5. Likewise a man cannot marry his father's sister, even though she be such only by adoption, nor his mother's sister, because they are regarded as representing their ascendants. On the same principle it is sound law that

dus, when enamoured of his niece Agrippina, daughter of Germanicus; but Constantine restored the disqualification. See Cod. Theod. I. 2, Gaius I. 62.

¹ The general rule is that marriage cannot be entered into by two persons who are in closer connection than the fourth degree of consanguinity: degrees being reckoned by counting the number of generations by which each person is removed from the common ancestor and taking the sum.

This rule would not prevent such unnatural alliances as those of great-uncle and great-niece, or great-aunt and great-nephew, and therefore needs supplementing by the regulation quoted above: "that no man may marry the granddaughter of a person whose daughter he could not marry, nor any woman be married

to the grandson if she could not be married to the son."

The fourth had not always been the first lawful degree. For Ulpian in v. 6 states that there was a time when that degree was a prohibited one, and from Tacitus (*Ann.* XII. 6) we see that at an earlier period still marriage was unlawful between persons so distant one from the other as six degrees.

² As women never have *potestas* over their children, your father by adopting a *woman* acquires no ancestral rights in reference to her daughter, so that you and she are as unconnected by civil as by natural ties. But not so if your father adopted a *man*: you could not marry his daughter, unless she had been born before the adoption and left under the *potestas* of her grandfather.

6. Affinitatis quoque veneratione quarundam nuptiis abstinere necesse est. Ut ecce privignam aut nurum uxorem ducere non licet, quia utraque filiae loco sunt. quod scilicet ita accipi debeat, si fuit nurus aut privigna: nam si adhuc nurus est, id est si adhuc nupta est filio tuo, alia ratione uxorem eam ducere non possis, quia eadem duobus nupta esse non potest; item si adhuc privigna tua est, id est si mater eius tibi nupta est, ideo eam uxorem ducere non poteris, quia duas uxores eodem tempore habere non licet. (7.) Socrum quoque et novercam prohibitum est uxorem ducere, quia matris loco sunt. quod et ipsum dissoluta demum affinitate procedit: alioqui, si adhuc noverca est, id est si adhuc patri tuo nupta est, communi iure impeditur tibi nubere, quia eadem duobus nupta esse non potest: item si adhuc socrus est, id est si adhuc filia

you are prohibited from marrying your great-aunt, whether paternal or maternal¹.

6. We must further abstain from marriage with certain women, out of regard for affinity. We cannot, for instance, marry a step-daughter or daughter-in-law, because they both are in the place of a daughter: but of course we must understand this to mean one who *has been* a daughter-in-law or step-daughter; for if she still be a daughter-in-law, i. e. if she be still married to your son, you cannot marry her for another reason, namely, that the same woman cannot be married to two men; and if she be still your step-daughter, i. e. if her mother be still married to you, you cannot marry her, because it is unlawful to have two wives at the same time. 7. It is also forbidden to marry a mother-in-law or step-mother, because they are in the place of a mother: and this rule, too, only comes into force after the affinity is brought to an end; if not, and if she still be your step-mother, i. e. still married to your father, you are barred from marriage by the general rule that the same woman cannot be married to two men; and if she be still your mother-in-law, i. e. if her daughter be still married

¹ This is merely applying to an adopted relative the third rule given in note 2, p. 28. For the statement that a man cannot marry his great-aunt is only another way of saying a woman cannot be married to her great-nephew, i. e. to the grandson

of her brother or sister: now plainly she could not marry the *son* of her brother or sister, they being in the third degree: and by the rule, if she cannot marry the son, she cannot marry the *grandson*.

eius tibi nupta est, ideo impediuntur nuptiae, quia duas uxores habere non possis. (8.) Mariti tamen filius ex alia uxore et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt¹, licet habeant fratrem sororemve ex matrimonio postea contracto natos. (9.) Si uxor tua post divortium ex alio filiam procreaverit, haec non est quidem privigna: sed Iulianus huiusmodi nuptiis abstinere debere ait²; nam nec sponsam filii nurum esse, nec patris sponsam novercam esse, rectius tamen et iure facturos eos qui huiusmodi nuptiis se abstinerint³. (10.) Illud certum est serviles quoque cognationes impedimento esse nuptiis, si forte pater et filia, aut frater et soror manumissi fuerint⁴. (11.) Sunt et aliae personae, quae propter diversas rationes nuptias contrahere prohibentur, quas in libris digestorum seu pandectarum ex veteri iure collectorum enumerari permisimus⁵.

to you, the marriage is prevented, because you cannot have two wives. 8. But the son of a husband by another wife and the daughter of a wife by another husband, or vice versâ, may legally contract marriage, although they may have a brother or sister born from the marriage subsequently contracted¹. 9. If your wife after being divorced bear a daughter to another husband, this daughter is not your step-daughter: yet Julian says you ought to abstain from marriage with such an one²: for so also the affianced bride of your son is not a daughter-in-law, nor the affianced bride of your father a mother-in-law, and yet those who abstain from marriage with such persons act more correctly and lawfully³. 10. It is certain that relationships amongst slaves are also a bar to marriage in the cases where a father and daughter or brother and sister are manumitted⁴. 11. There are other persons besides who are forbidden for various reasons to be united in marriage, whom we have permitted to be catalogued in the books of the Digests or Pandects collected from the ancient law⁵.

¹ They are not connected either by blood, adoption or affinity.

² She is not barred by affinity, because her mother did not die your wife.

³ The subject of betrothal (sponsalia) is treated of in D. 23. 1. It was a simple matter of consent, and could be dissolved by either party, or by the ascendant having *potestas*

over either party; and the repudiation founded no claim whatever to damages.

⁴ Although there is in the eye of the law no relationship amongst slaves, yet their natural consanguinity receives legal recognition the moment they become free.

⁵ Justinian here refers to D. 23. 2,

12. Si adversus ea quae diximus aliqui coierint, nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos¹ intellegitur. Itaque ii qui ex eo coitu nascuntur in potestate patris non sunt: sed tales sunt, quantum ad patriam potestatem pertinet, quales sunt ii quos mater vulgo concepit. nam nec hi patrem habere intelleguntur, cum his etiam incertus est: unde solent filii spurii appellari, vel a Graeca voce quasi *σποράδην* concepti, vel quasi sine patre filii². Sequitur ergo, ut et dissoluto tali coitu nec dotis exactioni locus sit. Qui autem prohibitas nuptias coeunt et alias poenas patiuntur, quae sacris constitutionibus continentur.

13. Aliquando autem evenit, ut liberi qui statim ut nati sunt in potestate parentum non fiant, postea autem redigantur in potestatem. Qualis est is qui, dum naturalis³ fuerat, postea

12. If any persons cohabit in contravention of the rules we have laid down, we do not admit the existence of husband, wife, marriage-ceremonies, marriage itself, or marriage-settlement¹. The children therefore of such a cohabitation are not under the *potestas* of their father, but so far as *patria potestas* is concerned stand on the same footing as those conceived in prostitution. For these too are considered to have no father, since their father is uncertain: and therefore they are usually called spurious children, either from a Greek word, being as it were conceived *σποράδην* (at random), or being children without a father². Hence it results that on the dissolution of a connection of this kind no claim for restitution of the marriage settlement is allowed. Moreover persons who enter into forbidden marriages are liable to other penalties enumerated in the imperial constitutions.

13. Sometimes it happens that descendants, who at the moment of their birth are not under the *potestas* of their ascendants, are subsequently brought under that *potestas*. Such is the case with a natural³ son, subjected afterwards to his

which specifies numerous prohibited marriages, chiefly those of senators or their children with *liberti*; governors of provinces with natives of the same; guardians with wards, except when the ward had attained the age of twenty-six years, or had been betrothed to the guardian by her fa-

ther; freeborn persons with actresses &c.

¹ For a full discussion of *dos*, see App. B.

² Ulpian IV. 2. *Sinepatris* according to the second derivation is contracted into *spurii*.

³ *Naturalis* here signifies illegiti-

curiae¹ datus, potestati patris subiicitur. nec non is qui, a muliere libera procreatus cuius matrimonium minime legibus interdictum fuerat, sed ad quam pater consuetudinem habuerat, postea ex nostra constitutione dotalibus instrumentis compositis in potestate patris efficitur²: quod et alii ex eodem matrimonio si fuerint procreati, similiter nostra constitutio praebuilt³.

TIT. XI. DE ADOPTIONIBUS.

Non solum tamen naturales liberi, secundum ea quae dixi-

father's *potestas* by being enrolled in the *curia*¹. So also is it with one born from a free woman, whom his father was not in any wise forbidden by law to marry but with whom he only cohabited, and who is subsequently made subject to his father's *potestas* by marriage settlements being drawn up in accordance with our constitution². This benefit our constitution also confers on him, even though other children be born from the same marriage³.

TIT. XI. ON ADOPTIONS.

Not only are our actual children under our *potestas*, according

mate. It more often denotes actual as opposed to adopted.

¹ The members of the *curia*, or governing body of a municipality, were called upon to serve expensive offices: so that he who made his son a member of a *curia* was a public benefactor and was rewarded by his son's legitimization. For further information on the subject of the *curia* and *decurionatus*, see App. (H.) to our edition of Gaius and Ulpian. Legitimation *per oblationem curiae* was introduced by Theodosius and Valentinian. See C. 5. 27. 3.

² Constantine invented legitimization *per subsequens matrimonium*, but Justinian recast the rules on the subject, requiring (1) that the parents should have been capable of a legal union at the time of conception: (2) that there should be a marriage agreement, or an agreement for a settle-

ment, duly drawn up (*instrumentum nuptiale, instrumentum dotale*): (3) that the children should consent to be subjected to *potestas*. See C. 5. 27. 10.

³ The readings of this passage vary considerably, and we have adopted Schrader's, which on the whole seems most satisfactory. If the common version be received: "quod et aliis liberis qui ex eodem matrimonio fuerint procreati similiter nostra constitutio praebuilt," the meaning cannot be that children born after the celebration of the marriage are under *potestas* by virtue of the constitution; for the civil law itself subjects them to *potestas*: but there is some probability in the interpretation put forward by several commentators, that the reference is to certain regulations which enabled a father to legitimise his natural children, when legitimization *per subsequens matrimo-*

mus, in potestate nostra sunt, verum etiam hi quos adoptamus.

1. Adoptio autem duobus modis fit, aut principali rescripto, aut imperio magistratus. Imperatoris auctoritate adoptare quis potest eos easve qui quaeve sui iuris sunt. quae species adoptionis dicitur arrogatio¹. Imperio magistratus adoptare licet eos easve qui quaeve in potestate parentum sunt, sive primum gradum liberorum obtineant, qualis est filius, filia, sive inferiorem, qualis est nepos, neptis, pronepos, proneptis.

2. Sed hodie ex nostra constitutione², cum filiusfamilias a patre naturali extraneae personae in adoptionem datur, iura potestatis naturalis patris minime dissolvuntur, nec quicquam ad patrem adoptivum transit, nec in potestate eius est, licet ab intestato jura successionis ei a nobis tributa sunt. si vero pater naturalis non extraneo, sed avo filii sui materno, vel si ipse pater naturalis fuerit emancipatus, etiam avo paterno vel proavo

to what we have already said, but those also whom we adopt.

1. Now adoption takes place in two ways, either by rescript of the emperor or by order of a magistrate. By authority of the emperor a man can adopt persons, whether male or female, who are *sui juris*: which species of adoption is called arrogation¹. By order of a magistrate he may adopt those persons, male or female, who are under the *potestas* of their ascendants, whether they stand in the first degree of descendants, as a son or daughter, or in a lower one, as a grandson, granddaughter, great-grandson, great-granddaughter.

2. But now-a-days, in accordance with a constitution of ours², when a subject-member of a family is given in adoption by his actual father to a stranger, the rights of *potestas* appertaining to the actual father are in no way destroyed, and none of them pass to the adopting father, neither is the adopted son under his *potestas*, although we allow him successory rights in the case of the adopting father's intestacy. But if the actual father give his son in adoption not to a stranger but to the son's maternal grandfather; or even to his paternal grandfather, supposing the actual father has been emancipated; or to a paternal great-

nium was impossible owing to the death of the mother.

¹ For further information on the

subject of adoption and arrogation, see App. C.

² C. 8. 48. 10.

simili modo paterno vel materno filium suum dederit in adoptionem: in hoc casu, quia in unam personam concurrunt et naturalia et adoptionis iura, manet stabile ius patris adoptivi, et naturali vinculo copulatum, et legitimo adoptionis modo constructum, ut et in familia et potestate huiusmodi patris adoptivi sit.

3. Cum autem impubes¹ per principale rescriptum arrogatur: causa cognita arrogatio permittitur, et exquiritur causa arrogationis, an honesta sit expediatque pupillo², et cum quibusdam condicionibus arrogatio fit, id est ut caveat arrogator personae publicae, hoc est tabulario, si intra pubertatem pupillus decesserit, restitutum se bona illis, qui, si adoptio facta non esset, ad successionem eius venturi essent. item non alias emancipare eos potest arrogator, nisi causa cognita digni emancipatione³ fuerint, et tunc sua bona eis reddat. sed etsi decedens pater eum exheredaverit, vel vivus sine iusta causa eum

grandfather under similar circumstances, or to a maternal great-grandfather: in these cases, since the rights of nature and adoption meet in one person, the authority of the adopting father is firmly maintained, linked as it is by the natural tie and drawn tighter by the lawful method of adoption, so that the son is both in the family and under the *potestas* of an adopting father of this description.

3. But when a person under the age of puberty¹ is arrogated by imperial rescript, the arrogation is only allowed after an examination of the circumstances, the reason for arrogation being investigated, to see whether it be honourable and to the advantage of the minor²; and the arrogation takes place upon certain conditions, the arrogator having to give security to a public officer, namely a notary, that if the pupil die before attaining puberty, he will deliver up his property to those persons who would have succeeded him if no adoption had taken place. Moreover the arrogator is not allowed to emancipate his arrogated children, unless on examination of the case they be proved deserving of emancipation³, and then he delivers back to them

¹ Fourteen for males, twelve for females. See I. 22. pr.

² Numerous examples of the considerations weighed are given in D.

I. 7. 17—19.

³ "Deserving of emancipation" is an euphemism for "undeserving to remain his children."

emancipaverit, iubetur quartam partem¹ ei suorum bonorum relinquere, videlicet praeter bona quae ad patrem adoptivum transtulit, et quorum commodum ei acquisivit postea.

4. Minorem natu non posse maiorem adoptare placet²: adoptio enim naturam imitatur, et pro monstro est, ut maior sit filius quam pater. debet itaque is qui sibi per arrogationem vel adoptionem filium facit plena pubertate, id est decem et octo annis praecedere. (5.) Licet autem et in locum nepotis vel pronepotis, vel in locum neptis vel proneptis, vel deinceps adoptare, quamvis filium quis non habeat. (6.) Et tam filium alienum quis in locum nepotis potest adoptare, quam nepotem in locum filii. (7.) Sed si quis nepotis loco adoptet, vel quasi ex eo filio quem habet iam adoptatum vel quasi ex illo quem naturalem in sua potestate habet: in eo casu et filius consentire debet, ne ei invito suus heres agnascatur³. sed ex contrario,

their property. And further still, if the adopter without just cause either when dying disinherit the adopted son, or in his lifetime emancipate him, he is ordered to bestow on him the fourth part of his goods¹; in addition, that is, to the goods which he brought to the adopting father and to those of which he procured him the benefit afterwards.

4. It is ruled that a younger person cannot adopt his senior²: for adoption follows nature, and it is monstrous for a son to be older than his father. Therefore a person who creates for himself a son by arrogation or adoption ought to be the senior by "full puberty" i.e. by eighteen years. 5. It is also lawful to adopt a person to stand in the position of grandson or great-grandson, granddaughter or great-granddaughter, although you may have no son. 6. It is allowable for a man to adopt either another man's son to be his own grandson, or another man's grandson to be his own son. 7. But if any one adopt another into the place of grandson, whether in the capacity of child to a son he has already adopted or in the capacity of child to an actual son under his *potestas*, in such case it is needful for the son also to consent, lest a *suus heres*³ be attached

¹ This is styled the *Quarta Antonina*, for a rescript of that Emperor established the major part of the safeguards named in the text, and this amongst them. Besides what is stated above, the *arrogatus* on

attaining puberty could if he pleased disannul the arrogation. D. I. 7. 33.

² This point was unsettled in the time of Gaius. See Gaius I. 106.

³ II. 19. 2.

si avus ex filio nepotem dat in adoptionem, non est necesse filium consentire.

8. In plurimis autem causis assimilatur is qui adoptatus vel arrogatus est, ei qui ex legitimo matrimonio natus est. et ideo si quis per Imperatorem¹, sive apud Praetorem, vel apud Praesidem provinciae non extraneum² adoptaverit, potest eundem alii in adoptionem dare. (9.) Sed et illud utriusque adoptionis commune est, quod et hi qui generare non possunt, quales sunt spadones, adoptare possunt; castrati autem non possunt. (10.) Feminae quoque adoptare non possunt, quia nec naturales liberos in potestate sua habent: sed ex indulgentia Principis ad solatium liberorum amissorum adoptare possunt.

11. Illud proprium est illius adoptionis quae per sacrum oraculum fit, quod is qui liberos in potestate habet, si se arrogandum dederit, non solum ipse potestati arrogatoris subiicitur,

to him against his will. But on the contrary if a grandfather give in adoption his grandson, the child of his son, there is no need for that son to consent.

8. Now an adopted or arrogated son is in many respects on the same footing with a son born from lawful matrimony: and therefore if any one make an adoption by imperial rescript¹, or adopt before the Praetor or the governor of a province a person who is not a stranger², he can transfer him in adoption to another. 9. It is also a rule common to both kinds of adoption that those who cannot procreate, as eunuchs born, may adopt, although eunuchs-made cannot do so. 10. Women too cannot adopt, because they have not even their actual children under their *potestas*, but by license from the emperor they can adopt as a consolation for children they have lost.

11. It is a peculiarity of the adoption which takes place by rescript, that if a man with children under his *potestas* give himself to be arrogated, he is not only personally subjected

¹ Sc. arrogate.

² By a person not a stranger is meant a descendant. Prior to Justinian's legislation the rule would have applied to all adopted children as well as to all arrogated: but after that emperor had drawn the distinction between *adoptio plena* and *adoptio minus plena*, (for which see App.

C,) those received in *adoptio plena*, i.e. descendants, could be transferred, because the adopter had *potestas* over them, whereas those who underwent *adoptio minus plena* remained in the *potestas* of their actual parent, and the adopter of course could not transfer a *potestas* which he had not received.

sed etiam liberi eius in eiusdem fiunt potestate tamquam nepotes. sic enim et divus Augustus non ante Tiberium adoptavit¹, quam is Germanicum adoptavit: ut protinus adoptione facta incipiat Germanicus Augusti nepos esse.

12. Apud Catonem bene scriptum refert antiquitas, servi si a domino adoptati sint, ex hoc ipso posse liberari. unde et nos eruditi in nostra constitutione² etiam eum servum quem dominus actis intervenientibus filium suum nominaverit liberum esse constituimus, licet hoc ad ius filii accipiendum ei non sufficit.

TIT. XII. QUIBUS MODIS IUS PTESTATIS SOLVITUR.

Videamus nunc, quibus modis hi qui alieno iuri subiecti sunt eo iure liberantur.

Et quidem servi quemadmodum potestate liberantur, ex his

to the arrogator's *potestas*, but his children also fall under the same *potestas* in the capacity of grandchildren. And for this reason the late emperor Augustus did not adopt Tiberius¹ until the latter had adopted Germanicus, in order that Germanicus, immediately upon the adoption (of Tiberius) taking place, might be the grandson of Augustus.

12. The ancients record a sensible maxim of Cato, that slaves are set free by their master through the mere fact of his adopting them. Therefore we in our wisdom have laid down in a constitution of ours² that a slave shall be free when his master has given him the name of son by a formal document, although this is not enough to confer on him a son's rights.

TIT. XII. ON THE METHODS BY WHICH THE RIGHT OF
POTESTAS IS DESTROYED.

Now let us see by what means those who are subject to the authority of another are set free from that authority.

¹ Tiberius was as a matter of fact arrogated, not adopted; and moreover he was arrogated *per populum*, as Suetonius tells us; so that we may conclude the method *per rescriptum* was not even invented in

Augustus' time. We know that it did not become the prevalent mode for nearly two centuries later. See Ulp. VIII.

² C. 7. 6. 1. 10.

intelligere possumus quae de servis manumittendis superius¹ exposuimus.

Hi vero qui in potestate parentis sunt mortuo eo sui iuris fiunt. Sed hoc distinctionem recipit. Nam mortuo patre sane omnimodo filii filiaeve sui iuris efficiuntur. mortuo vero avo non omnimodo nepotes neptesque sui iuris fiunt, sed ita, si post mortem avi in potestatem patris sui recasuri non sunt. itaque si moriente avo pater eorum et vivit et in potestate patris sui est, tunc post obitum avi in potestate patris sui fiunt; si vero is quo tempore avus moritur, aut iam mortuus est, aut exiit de potestate patris², tunc hi, quia in potestatem eius cadere non possunt, sui iuris fiunt. (1.) Cum autem is qui ob aliquod maleficium in insulam deportatur civitatem³ amittit, sequitur, ut

How slaves are freed from *potestas* we may learn from the explanation of the manumission of slaves given above¹.

But those who are in the *potestas* of an ascendant become *sui iuris* on his death. This however admits of a qualification. For undoubtedly on the death of a father sons and daughters in all cases become *sui iuris*. But on the death of a grandfather grandsons and granddaughters do not become *sui iuris* in all cases, but only if after the death of the grandfather they will not relapse into the *potestas* of their father. Therefore if at the grandfather's death their father be alive and in the *potestas* of his father, then after the death of the grandfather they come under the *potestas* of their father: but if at the time of the grandfather's death the father either be dead or have passed from the *potestas* of his father², then the grandchildren, inasmuch as they cannot fall under his *potestas*, become *sui iuris*.
1. Again since he who is deported³ to an island for a crime

¹ I. 5. The greater part of this title is a mere transcript from Gaius I. 124—135. See also Ulpian X.

² Sc. by emancipation, an explanation of which is given below in I. 12. 6.

³ The forms of banishment under the later emperors were *deportatio* and *relegatio*; replacing the *aqua et ignis interdictio* of earlier days, mentioned in Gaius I. 128. A *deportatus* always lost two of the elements of *status*, viz. citizenship and family, and thus un-

derwent a *capitis diminutio media*, (see Gaius I. 159—163): a *relegatus* lost none of these elements, and so suffered no *capitis diminutio* at all: a man interdicted from fire and water saved his liberty, but lost citizenship and with it family, and so, like the *deportatus*, underwent a *capitis diminutio media*. Deportation generally involved penal servitude, and therefore a *capitis diminutio maxima*: not always, however, as we see from the distinction made in

qui eo modo ex numero civium Romanorum tollitur perinde acsi mortuo eo desinant liberi in potestate eius esse. pari ratione et si is qui in potestate parentis sit in insulam deportatus fuerit, desinit in potestate parentis esse. Sed si ex indulgentia principali restituti fuerint, per omnia pristinum statum recipiunt. (2.) Relegati autem patres in insulam in potestate sua liberos retinent. et ex contrario liberi relegati in potestate parentum remanent. (3.) Poenae servus effectus filios in potestate habere desinit. Servi autem poenae efficiuntur qui in metallum damnantur, et qui bestiis subiiciuntur. (4.) Filiusfamilias si militaverit, vel si Senator vel Consul fuerit factus, manet in patris potestate. militia enim vel consularia dignitas de patris potestate filium non liberat. Sed ex constitutione

loses his citizenship, it follows that the descendants of a man thus removed from the category of Roman citizens cease to be under his *potestas*, just as though he were dead. On like principle also, if one under the *potestas* of his ascendant be deported to an island, he ceases to be under the *potestas* of his ascendant. But if restored by the mercy of the emperor, such persons recover in every respect their original position. 2. Ascendants, on the contrary, who are relegated to an island, retain their descendants under their *potestas*: and in the converse case, descendants relegated to an island remain under the *potestas* of their ascendants. 3. Any one made a penal slave ceases to have his descendants under his *potestas*; and people are made penal slaves when condemned to the mines or exposed to the wild-beasts. 4. If a subject-member of a family serve as a soldier, or be made a Senator or a Consul, he remains under his ascendant's *potestas*, for neither service nor the consular dignity exempts

this very passage between *deportatus* and *poenae servus*; whilst relegation was merely confinement to a certain town or district, with perfect freedom in all things but the right of locomotion. *Aque et ignis interdictio* was a fiction whereby the rule was evaded that no Roman citizen could be banished without his own consent: in fact he was *not banished* by any formal decree, but his fellow-

citizens being forbidden to furnish him with the necessities of life, he was driven to *expatriate himself*.

As *patria potestas* was a pure matter of civil law (IX. 2), it could be exercised by none but Romans and over none but Romans; and therefore either *deportatio* or *aque et ignis interdictio* of ascendant or descendant was a cause of its destruction.

nostra¹ summa Patriciatus² dignitas illico ab imperialibus codicillis praestitis a patria potestate liberat. quis enim patiatur patrem quidem posse per emancipationis modum suae potestatis nexibus filium relaxare, imperatoriam autem celsitudinem non valere eum quem sibi patrem elegit ab aliena eximere potestate?

5. Si ab hostibus captus fuerit parens, quamvis servus hostium fiat, tamen pendet ius liberorum propter ius postliminii, quia hi qui ab hostibus capti sunt, si reversi fuerint, omnia pristina iura recipiunt. idcirco reversus et liberos habebit in potestate, quia postliminium fingit eum qui captus est semper in civitate fuisse. si vero ibi decesserit, exinde ex quo captus est pater, filius sui iuris fuisse videtur. Ipse quoque filius ne posve si ab hostibus captus fuerit, similiter dicimus propter ius postliminii ius quoque potestatis parentis in suspenso esse.

him from it. But according to a constitution of our own¹ the supreme dignity of the patriciate² frees the recipient from *patria potestas* immediately the imperial patent is given. For who could endure that a father should be able to release his son by emancipation from the bonds of his *potestas*, whilst the might of the emperor should not have power to deliver from the *potestas* of another that person whom he has chosen to be "a father" to himself?

5. If an ascendant be taken by the enemy, although for the while he becomes a slave of the enemy, yet by the rule of postliminy his authority over his descendants is merely suspended; for those taken by the enemy, if they return, recover all their original rights. Therefore on his return he will have his descendants under his *potestas*, since postliminy maintains the fiction that a captive has always been in the state. But if he die there, his son will be *sui iuris* from the instant when the father was taken. Also if it be the son or grandson who is taken by the enemy, we say in like manner that by the rule of postliminy

¹ C. 12. 3. 5.

² The word *patricius* had been changed by Constantine from its original meaning into a title of honour. The distinction between patricians and plebeians had, of course, been obsolete long before, the death-blow

having been dealt to it by the Lex Hortensia, B.C. 286, which put the two orders of the state on a footing of equality. For the exact mode in which this levelling was effected, see our note on Gaius 1. 3.

Dictum est autem postliminium a limine et post, ut eum qui ab hostibus captus in fines nostros postea pervenit postliminio reversum recte dicimus. nam limina sicut in domibus finem quendam faciunt, sic et imperii finem limen esse veteres voluerunt¹: hinc et limes dictus est, quasi finis quidam et terminus. Ab eo postliminium dictum, quia eodem limine revertebatur quo amissus erat. Sed et qui victis hostibus recuperatur postliminio rediisse existimatur².

6. Praeterea emancipatione quoque desinunt liberi in potestate parentum esse. Sed ea emancipatio antea quidem vel per antiquam legis observationem procedebat, quae per imaginarias venditiones et intercedentes manumissiones celebrabatur³, vel ex imperiali rescripto⁴. Nostra autem providentia et hoc in melius per constitutionem⁵ reformavit, ut fictione pristina ex-

the *potestas* of the ascendant is merely suspended. "Postliminy" is derived from *post* and *limen*, so that we are correct in stating that a man who is taken by the enemy and afterwards comes within our boundaries, returns by postliminy. For as the thresholds (*limina*) constitute a sort of boundary in houses, so the ancients would have the boundary of the empire to be a threshold¹: hence too the derivation of the word *limes*, a kind of end and termination. Postliminy, then, gets its name from the fact that the man returns by the selfsame threshold from which he was lost. A prisoner recovered on the defeat of the enemy is also considered as returning by postliminy².

6. Descendants also cease to be under the *potestas* of their ascendants through emancipation: and this emancipation used formerly to be effected either by the ancient legal form, which was solemnized by means of imaginary sales with manumissions interposed³, or by imperial rescript⁴. But our forethought has by a constitution⁵ remodelled this point also for the better, so

¹ As a threshold is a limit, therefore (by a false conversion of the proposition) a limit is a threshold.

² The nature of postliminy is partly explained in the text. Its effect was that all things taken by the enemy were, on recapture, replaced in their original condition. Property retaken was restored to its original owner, and not left in the hands of the recaptor; liberated cap-

tives were regarded as having never been absent. See D. 49. 15, especially ll. 4 and 12, where the technicalities of the subject are examined and discussed.

³ See Gaius I. 132.

⁴ The emperor Anastasius first invented the method of emancipation by rescript. See C. 8. 49. 5.

⁵ C. 8. 49. 6.

plosa, recta via apud competentes iudices vel magistratus parentes intrent, et filios suos vel filias, vel nepotes vel neptes, ac deinceps, sua manu¹ dimitterent. et tunc ex edicto Praetoris² in huius filii vel filiae, nepotis vel neptis bonis, qui vel quae a parente manumissus vel manumissa fuerit, eadem iura praestantur parenti quae tribuuntur patrono in bonis liberti; et praeterea si impubes sit filius vel filia vel ceteri, ipse parens ex manumissione tutelam eius nanciscitur³.

7. Admonendi autem sumus liberum esse arbitrium ei qui filium et ex eo nepotem vel neptem in potestate habebit, filium quidem de potestate dimittere, nepotem vero vel neptem retinere; et ex diverso filium quidem in potestate retinere, nepotem vero vel neptem manumittere (eadem et de pronepote

that the antiquated fiction is exploded, and ascendants can go straight to competent judges or magistrates, and release from their authority¹ their sons or daughters, grandsons or granddaughters, &c. And thereupon, according to the Praetor's edict², the same rights are conferred on the ascendant in relation to the goods of this son or daughter, grandson or granddaughter, as those which are allowed to a patron in regard to the goods of a freedman: and further if the son or daughter or other descendant be under puberty, the ascendant obtains the guardianship over him by virtue of the emancipation³.

7. We must besides take note that a man who has under his *potestas* a son and a grandson or granddaughter by that son, has unrestricted power to dismiss the son from his *potestas*, and to retain the grandson or granddaughter in it: and conversely, to retain the son under his *potestas*, but manumit the grandson or granddaughter (and be it understood the same applies also

¹ This might be translated "with their own hand" i.e. "without application to *comitia* or emperor"; but we prefer the other translation given above. If it be objected that children were not under *manus*, but under *potestas*, the answer is that these terms were once convertible; or that *manus*, as observed by Maine in his *Ancient Law*, was an archaic term comprehending the relations

afterwards designated by the names *dominium*, *potestas*, *mancipium*, and *manus*. Justinian, or rather the lawyers who compiled the Institutes under his commission, having their minds filled with ancient lore, seem in this passage to have used the old-fashioned term *manus* when intending to express *potestas*.

² III. 9. 4.

³ I. 18.

have
manu
ed by
emancipation

vel pronepte dicta esse intellegantur), vel omnes sui iuris efficere.

8. Sed et si pater filium quem in potestate habet avo vel proavo naturali, secundum nostras constitutiones¹ super his habitas, in adoptionem dederit, id est si hoc ipsum actis intervenientibus apud competentem iudicem manifestaverit, praesente eo qui adoptatur, et non contradicente, nec non eo qui adoptat, solvitur quidem ius potestatis patris naturalis, transit autem in huiusmodi parentem adoptivum, in cuius persona et adoptionem plenissimam esse antea diximus. (9.) Illud autem scire oportet, quod si nurus tua ex filio tuo conceperit, et filium postea emancipaveris vel in adoptionem dederis, praegnante nuru tua, nihilominus quod ex ea nascitur in potestate tua nascitur²;

to a great-grandson or great-granddaughter), or to make them all *sui iuris*.

8. But if a father, having a son under his *potestas*, give him in adoption to his grandfather or great-grandfather by blood after the method laid down in our constitutions enacted on this subject¹, that is, if he declare this intent by a formal deed executed before a competent magistrate, in the presence and without the dissent of the person who is adopted and the person who adopts,—then the right of *potestas* appertaining to the actual father is extinguished and transferred to the adoptive father of the character above-named; in respect of whom, as we have already stated, the adoption is most complete. 9. But it is necessary to observe that if your daughter-in-law conceive by your son, and you afterwards emancipate your son or give him in adoption whilst your daughter-in-law is pregnant, the child she bears is nevertheless born under your *potestas*²: but if the child be conceived after the emancipation

¹ C. 8. 48. 10 and 11.

² He is under your *potestas*, because supposing both parents to have been Romans and the marriage properly solemnized, the child takes his father's status at the moment of conception.

The three rules on the subject of original or birth status are :

(1) If the parents be Romans and lawfully married, the child follows

the father's condition at the time of conception.

(2) If the parents be Romans and not lawfully married, the child follows the condition of the mother at the time of birth.

(3) If either parent be a foreigner, the child is a foreigner. *Lex Mensia*.

In the time of Gaius there were more intricate rules depending on the parties having or not having

quod si post emancipationem vel adoptionem fuerit conceptus, patris sui emancipati vel avi adoptivi potestati subiicitur¹; (10.) et quod neque naturales liberi, neque adoptivi ullo paene modo possunt cogere parentem de potestate sua eos dimittere².

TIT. XIII. DE TUTELIS.

Transeamus nunc ad aliam divisionem personarum. nam ex his personis quae in potestate non sunt, quaedam vel in tutela sunt vel in curatione, quaedam neutro iure tenentur. videamus igitur de his quae in tutela vel in curatione sunt: ita enim intellegemus ceteras personas quae neutro iure tenentur.

Ac prius dispiciamus de his quae in tutela sunt.

or adoption, he is subject to the *potestas* of his emancipated father or his adopting grandfather¹: 10. and we must further observe that there is hardly any way by which either actual or adopted children can compel an ascendant to release them from his *potestas*².

TIT. XIII. ON TUTELAGES.

Now let us pass to another division of persons: for of those who are not under *potestas* some are under *tutela* or *curatio*, some are under neither of these powers. Let us, therefore, consider about those who are under *tutela* or *curatio*, for so we shall discriminate the other persons who are subject to neither power.

And first let us look at the case of those who are under *tutela*.

conubium or right of intermarriage: all Roman citizens had *conubium* with other Roman citizens, but with Latins and foreigners there was no *conubium* except by virtue of special and personal grant. Ulpian v. 4. When Justinian abolished all grades in citizenship and made Latins &c. full *cives Romani* (l. 5. 3.), the question of *conubium* became comparatively unimportant, although still there were cases where the right did not exist, some of which are enumerated in the note on l. 10. 11.

¹ This of course refers to an *adop-*

tio plena only, for in an *adoptio minus plena* (see App. C.) the son was not removed from the *potestas* of his actual father, and therefore the grandson was born subject to the same *potestas*.

² There were one or two instances in which a son could claim emancipation, the chief being when he claimed to have an arrogation set aside which had been effected when he was under puberty; D. 1. 7. 33. See also D. 37. 12. 5, D. 35. 1. 92, D. 27. 10. 16. 2, C. 11. 40. 6, C. 8. 52. 2.

1. Est autem tutela, ut Servius definit¹, ius ac potestas in capite libero, ad tuendum eum qui propter aetatem se defendere nequit, iure civili data ac permissa. (2.) Tutores autem sunt qui eam vim ac potestatem habent, ex qua re ipsa nomen ceperunt. itaque appellantur tutores, quasi tuitores atque defensores, sicut aeditui dicuntur qui aedes tuentur.

3. Permissum est itaque parentibus liberis impuberibus² quos in potestate habent testamento tutores dare. et hoc in filio filiaque omnimodo procedit; nepotibus tamen neptibusque ita demum parentes possunt testamento tutores dare, si post mortem eorum in patris sui potestatem non sint recasuri³. itaque si filius tuus mortis tuae tempore in potestate tua sit, nepotes ex eo non poterunt testamento tuo tutorem habere, quamvis in potestate tua fuerint; scilicet quia, mortuo te, in patris sui potestatem recasuri sunt. (4.) Cum autem in pluribus aliis causis postumi⁴ pro iam natis habentur, et in hac

1. Now *tutela*, according to Servius' definition¹, is authority and governance over a free person, given and permitted by the civil law for the protection of one who cannot for his tender years defend himself. 2. And tutors are those who have this authority and governance, from which very fact they have got their name, and are therefore called tutors as being protectors (*tuitores*) and defenders, just as the custodians of temples are called *aeditui*.


3. Ascendants, then, are permitted to give tutors by testament to descendants below the age of puberty² whom they have under their *potestas*: and this is universally allowable in the case of a son or daughter: to grandsons, however, or granddaughters the ascendants can only give tutors by their testament in those instances where they will not after their ascendant's death relapse under the *potestas* of their father³. Therefore, if your son at the time of your death be under your *potestas*, your grandsons through him cannot have a tutor given them by your testament, although they are in your *potestas*: the reason, of course, being that after your death they will fall under the *potestas* of their father. 4. But inasmuch as after-born descendants are in many other cases reckoned as already born⁴, it has been

¹ Quoted by Paulus in D. 26. 1.
1. pr.

² I. 22. pr.

³ I. 12. pr.

⁴ *Postumus* is here used in the sense of "born after the ancestor's



causa placuit non minus postumis, quam iam natis testamento tutores dari posse, si modo in ea causa sint, ut si vivis parentibus nascerentur, sui et in potestate eorum fierent¹. (5.) Sed si emancipato filio tutor a patre testamento datus fuerit, confirmandus est ex sententia Praesidis omnimodo, id est sine inquisitione².

TIT. XIV. QUI DARI TUTORES TESTAMENTO POSSUNT.

Dari autem potest tutor non solum paterfamilias, sed etiam filiusfamilias³. (1.) Sed et servus proprius testamento cum

ruled in this matter also that tutors can be given by testament to the after-born equally with those already existing, provided only their status is such that if they had been born in the lifetime of their ascendants they would have been their *sui heredes* and under their *potestas*¹. 5. But a tutor given to an emancipated son by a father in his testament must always be confirmed by order of the *praeses*, though this confirmation is to be given without inquiry².

TIT. XIV. WHAT PERSONS CAN BE APPOINTED TUTORS IN A TESTAMENT.

Not only the head of a family but even a subject-member of a family can be appointed tutor³. 1. The (testator's) own slave

death," sometimes it means "born after the making of his testament."

¹ A *suus heres*, being of necessity a descendant, is also of necessity under *patria potestas*: but it does not follow that all who are subject to *potestas* are *sui heredes*; for those only are so called who have no living person intervening between themselves and the *paterfamilias*. II. 19. 2.

² An emancipated son is free from *potestas* and therefore not a *suus heres*; but the tutorial appointment of the father, though void in strict law, can and will be maintained in equity, if application be made to that end; for there is a strong presumption that no one can judge better than the father what is expedient for the minor. D. 26. 3. 8—10. Justinian,

however, rather overstates the case when he says *omnimodo*; for in D. 26. 7. 3. 3, it is laid down that although the magistrate usually ratifies the appointment made in the testament, he will nevertheless occasionally set it aside; for instance when the father was under 25 at the time he made it, or when the tutor's character has changed for the worse since the appointment.

³ A *filius familias* was only subordinate in domestic matters, and not in political business; and a tutorship was a public or quasi-public duty, as is expressly stated by Pomponius in D. 1. 6. 9: "*filius familias in publicis causis loco patris familias habetur, veluti si vel magistratum gerat vel tutor detur.*"

libertate recte tutor dari potest. sed sciendum est eum et sine libertate tutorem datum tacite libertatem directam accepisse videri, et per hoc recte tutorem esse. plane si per errorem quasi liber tutor datus sit, aliud dicendum est¹. Servus autem alienus pure inutiliter testamento datur tutor: sed ita, cum liber erit, utiliter datur². Proprius autem servus inutiliter eo modo tutor datur. (2.) Furiosus vel minor vigintiquinque annis tutor testamento datus, tunc tutor erit, cum compos mentis aut maior vigintiquinque annis factus fuerit.

3. Ad certum tempus vel ex certo tempore, vel sub conditione, vel ante heredis institutionem, posse dari tutorem non

may also be lawfully appointed tutor by testament with a gift of liberty. And we must observe that even if he be appointed without mention of his liberty, he is regarded as receiving a direct gift by implication, and therefore can lawfully be tutor. But clearly if he be appointed tutor under a mistaken supposition that he is free, we must decide the other way¹. Again, the slave of another person cannot be effectually appointed in absolute terms, although his appointment is effectual if worded "when he shall be free²." But it is of no avail for our own slave to be appointed in such terms. 2. A madman or a person under twenty-five years of age appointed tutor in a testament will be able to act when he becomes sane or attains the age of twenty-five.

3. There is no doubt that a tutor may be appointed either up to a certain time, or to start from a certain time, or under a condition, or (in a part of the testament) prior to the institu-

¹ The presumption is that a gift of liberty is intended, for otherwise the execution of the tutorship would be impossible: still the presumption is not of the character described as "*juris et de jure*" i.e. incontrovertible, but a *præsumptio juris* only, so that proof of contrary intent can be admitted. Proof that the tutor was appointed under a mistaken notion of his being free is fatal to the appointment, but of course it must be clearly made out; and a mere omission of the gift of liberty is *primâ facie* evidence of carelessness rather than of error as to the status of the

appointee.

² This regulation of Justinian's was an innovation; for it is expressly stated by Ulpian in D. 26. 2. 10. 4, that mere omission of the gift of liberty is not a fatal objection to the appointment of a slave, if he be owned by another person; although if he be the testator's own property, the words "when he shall be free" are an indication that the testator has no present intention of liberating him; so that by his own conduct he negatives the implication of a gift of liberty, without which the slave's appointment as tutor is invalid.

dubitatur¹. (4.) certae autem rei vel causae tutor dari non potest, quia personae, non causae vel rei datur².

5. Si quis filiabus suis vel filiis tutores dederit, etiam postumae vel postumo videtur dedisse, quia filii vel filiae appellatione et postumus et postuma continentur. Quodsi nepotes sint, an appellatione filiorum et ipsis tutores dati sunt? dicendum est ut ipsis quoque dati videantur, si modo liberos dixit; ceterum, si filios, non continebuntur: aliter enim filii, aliter nepotes appellantur. Plane si postumis dederit, tam filii postumi, quam ceteri liberi continebuntur³.

TIT. XV. DE LEGITIMA AGNATORUM TUTELA.

Quibus autem testamento tutor datus non sit, his ex lege

tion of the heir¹. 4. But a tutor cannot be appointed for a specific property or transaction, because the tutor is appointed to the person and not to the transaction or property².

5. When any one has appointed tutors to his "daughters or sons," he is understood to have appointed them even to an after-born daughter or son: because an after-born child, male or female, is comprehended under the appellation of "son or daughter." But supposing there be grandchildren, are tutors appointed to these also under the designation of "sons"? We must rule that they are appointed to these as well, if the testator used the word "children;" but that such are not comprehended, if he employed the expression "sons:" for "son" means one thing, "grandson" another. But, certainly, if he appointed them to "those after-born," both after-born sons and other after-born descendants will be included³.

TIT. XV. ON THE STATUTORY TUTELAGE OF THE AGNATES.

To those who have no tutor given them by testament, the

¹ II. 20. 34. But it is to be noted that although a legacy set down before the institution of the heir was invalid previously to Justinian's legislation, yet an appointment of a tutor placed in such priority had been upheld by one school of lawyers even in Gaius' time, on the ground that no charge was thereby laid on the inheritance. Gaius II. 231.

² But when property was situated in different provinces this rule was set aside. D. 26. 2. 15.

³ This title of the Institutes is an abridgment of D. 26. 2, and a somewhat imperfect abridgment. A perusal of that portion of the Digest is therefore necessary for those who wish thoroughly to comprehend the subject.

duodecim tabularum¹ agnati sunt tutores, qui vocantur legitimi. (1.) Sunt autem agnati per virilis sexus personas cognatione coniuncti, quasi a patre cognati: veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrum filius neposve ex eo. At qui per feminini sexus personas cognatione iunguntur non sunt agnati, sed alias naturali iure cognati. itaque amitae tuae filius non est tibi agnatus, sed cognatus, et invicem scilicet tu illi eodem iure coniungeris; quia qui nascuntur patris, non matris familiam sequuntur². (2.) Quod autem lex ab intestato vocat ad tutelam agnatos, non hanc habet significationem, si omnino non fecerit testamentum is qui poterat tutores dare, sed si, quantum ad tutelam pertinet, intestatus decesserit. quod tunc quoque accidere intellegitur, cum is qui datus est tutor vivo testatore decesserit³.

agnates are tutors by a law of the Twelve Tables¹, and they are called statutory tutors. 1. Now the agnates are those united in relationship through persons of the male sex, relations, that is to say, through the father: for instance a brother born from the same father, the son of that brother, and his grandson by that son; an uncle on the father's side, that uncle's son, and his grandson by that son. But those who are joined in relationship through persons of the female sex are not agnates, but merely cognates by the natural tie. Therefore the son of your father's sister is not your agnate, but your cognate, and conversely of course you are joined to him by the same tie: because children follow the family of their father, not that of their mother². 2. The maxim that "the law calls the agnates to be tutors on an intestacy" does not apply merely to the case where a man who has the right to appoint tutors fails to make a testament at all, but further to the case where he dies intestate in respect of the tutelage alone; which also is regarded as being the state of affairs when a tutor is appointed, but dies in the testator's lifetime³.

¹ Tab. v. l. 6.

² This paragraph is copied almost verbatim from Gaius I. 155, 156.

Justinian in his 118th novel abolished all distinctions between agnates and cognates; and the rule as to tutorships was thenceforward that he should be tutor to an infant, who

would have been heir-at-law if the infant had not existed. Before the issuing of the novel women could never be tutors, but by it a mother and grandmother were rendered capable of the office.

³ From Paulus in D. 26. 4. 6.

3. Sed agnationis quidem ius omnibus modis capitis deminutione plerumque perimitur: nam agnatio iuris est nomen. cognationis vero ius non omnibus modis commutatur, quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non utique¹.

TIT. XVI. DE CAPITIS MINUTIONE.

Est autem capitis deminutio prioris status commutatio. eaque tribus modis accidit: nam aut maxima est capitis deminutio, aut minor quam quidam mediam vocant, aut minima².

3. The tie of agnation is generally destroyed in all respects by a *capitis deminutio*: for agnation is a notion of civil law only. But the tie of cognation is not altogether changed by *capitis deminutio*, because a civil law principle may indeed destroy civil law rights, but never those which are natural¹,

TIT. XVI. ON CAPITIS DEMINUTIO.

Capitis deminutio is a change of the original *caput*, and it occurs in three ways: for it is either the *capitis deminutio maxima*; or the *minor*, which some call *media*; or the *minima*².

¹ So also we have: "Jura sanguinis nullo jure civili dirimi possunt;" Pomponius in D. 50. 17. 8. Yet in the very next title Justinian states that *capitis deminutio*, at any rate of the two higher kinds, did destroy cognatic rights. It would be more correctly put: "civil law cannot destroy relationship, though it can destroy the rights originating from relationship, whether they be civil or natural."

² Justinian's definitions of *capitis deminutio* are copied from Gaius (I. 159—162), and accord with those given by Ulpian in *The Rules* (XI. 9—13).

It is to be observed that *status* and *caput* are not identical terms in Roman law: a slave is often said to have *status*, but it is also affirmed of him that he has "*nullum caput*." See § 4 below. Austin is of opinion

that "*status* and *caput* are not synonymous expressions, but the term *caput* signifies certain conditions which are capital or principal and which cannot be acquired or lost without a mighty change in the legal position of the party." *Caput* necessarily implies the possession of rights: *status* generally implies the possession of rights, but may denote mere obnoxiousness to duties, e.g. the *status* of a slave. See Austin, Lecture XII.

Caput includes the three elements of Liberty, Citizenship and Family: and *capitis deminutio* implies the loss of the three, of the second and third, or of the third alone, according as it is *maxima*, *media* or *minima*. A more complete discussion of the effects of a *capitis deminutio* and the derivation of the term will be found in App. D.

1. Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit. quod accidit in his qui servi poenae efficiuntur atrocitate sententiae, vel liberti ut ingrati circa patronos condemnati¹, vel qui ad pretium participandum se venundari passi sunt².

2. Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. quod accidit ei cui aqua et igni interdictum fuerit, vel ei qui in insulam deportatus est³.

3. Minima capitis deminutio est, cum et civitas et libertas retinetur, sed status hominis commutatur. quod accidit in his qui, cum sui iuris fuerunt, coeperunt alieno iuri subiecti esse, vel contra. (4.) Servus autem manumissus capite non minuitur, quia nullum caput habuit. (5.) Quibus autem dignitas magis quam status permutatur, capite non minuuntur: et ideo senatu motum capite non minui constat.

6. Quod autem dictum est manere cognationis ius et post capitis deminutionem, hoc ita est, si minima capitis deminutio

1. The *maxima capitis deminutio* is when a man loses at once both citizenship and liberty. Which happens to those who by the severest of sentences are made penal slaves, or when freedmen are condemned for ingratitude towards their patrons¹, or when men allow themselves to be sold in order that they may share in their own price².

2. The *minor* or *media capitis deminutio* is when citizenship indeed is lost, but liberty retained; which happens to him who is interdicted from fire and water, or deported into an island³.

3. The *minima capitis deminutio* is when both citizenship and liberty are retained, but the *status* of the man is changed: which is the case with persons who were originally *sui juris* and become subject to the authority of another, or vice versâ.

4. But a slave suffers no *capitis deminutio* when manumitted, because he has no *caput*. 5. And there is no *capitis deminutio* in the case of men who undergo a change of dignity rather than of *status*: and therefore it is well established that expulsion from the Senate works no *capitis deminutio*.

6. Now when it was said that the tie of cognation still remained even after a *capitis deminutio*, we meant that it was so if

¹ D. 25. 3. 6. 1.

² I. 3. 4.

³ See note on I. 12. 1.

interveniat: manet enim cognatio. nam si maxima capitis deminutio incurrat, ius quoque cognationis perit, ut puta servitute alicuius cognati, et ne quidem si manumissus fuerit, recipit cognationem. sed etsi in insulam deportatus quis sit, cognatio solvitur¹. (7.) Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum qui proximio gradu sunt, vel si eiusdem gradus sint, ad omnes.

TIT. XVII. DE LEGITIMA PATRONORUM TUTELA.

Ex eadem lege duodecim tabularum² libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur: non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, iusserat lex ad patronos liberosve eorum pertinere, crediderunt

a *minima capitis deminutio* occurs: for it is then the cognation continues. But if there be a *maxima capitis deminutio*, even the tie of cognation is ended; for example by the slavery of a cognate; and although such an one be manumitted, he does not recover his cognation. So too if a man be deported into an island, his cognation is destroyed¹.

7. When the tutelage devolves upon the agnates, it does not devolve upon them all simultaneously, but on those alone who are of the nearest degree, or upon them all if they be of the same degree.

TIT. XVII. ON THE STATUTORY TUTELAGE OF PATRONS.

By virtue of the same law of the Twelve Tables² the tutelage of freedmen and freedwomen devolves on the patrons and their children; and this too is styled a statutory tutelage: not because express provision is made in that law with respect to such tutelage, but because it is gathered by construction as surely as if it had been set down in the wording of the law. For from the very fact that the law ordered the inheritances of freedmen and freedwomen, in case of their dying intestate, to

¹ See note on I. 15. 3.

² Tab. v. l. 8.

veteres voluisse legem etiam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocat, eosdem et tutores esse iussit: quia plerumque, ubi successionis est emolumentum, ibi et tutelae onus esse debet¹. ideo autem diximus plerumque, quia, si a femina impubes manumittatur, ipsa ad hereditatem vocatur, cum alius erit tutor².

TIT. XVIII. DE LEGITIMA PARENTUM TUTELA.

Exemplo patronorum recepta est et alia tutela, quae et ipsa legitima vocatur. nam si qui filium aut filiam, nepotem aut neptem ex filio, et deinceps, impuberem emancipaverit, legitimus eorum tutor erit³.

TIT. XIX. DE FIDUCIARIA TUTELA.

Est et alia tutela, quae fiduciaria⁴ appellatur. Nam si parens

belong to the patrons or their children, the ancients concluded that the law intended their tutelages also to devolve upon them, (since it ordered that the agnates too, whom it called to the inheritance, should be tutors as well;) because in general whithersoever the profit of the succession goes, there also ought the burden of the tutelage to fall¹. But we say "in general," because when a slave under puberty is manumitted by a woman, she is called to the inheritance, although another person will be tutor².

TIT. XVIII. ON THE STATUTORY TUTELAGE OF ASCENDANTS.

There is another tutelage admitted into use upon the precedent of that of the patrons, and this too is denominated statutory. For if any one emancipate a son or daughter, a grandson or a granddaughter by a son, &c., whilst such person is under puberty, he will be their statutory tutor³.

TIT. XIX. ON FIDUCIARY TUTELAGE.

There is also another kind of tutelage, which is styled fiduciary⁴. For if an ascendant manumit his son or daughter,

¹ See Gaius I. 165.

² Other exceptions are stated by Ulpian in D. 26. 4. 1. 1.

A woman could never be a tutor, and in early times was always herself under tutelage. The tutor of the

woman would also be tutor of the slave whom she manumitted, or rather whom he manumitted at her request.

³ Gaius I. 172, 175.

⁴ There were really two kinds of

filium vel filiam, nepotem vel neptem, vel deinceps, impuberes manumiserit, legitimam nanciscitur eorum tutelam; quo defuncto si liberi virilis sexus extant, fiduciarii tutores filiorum suorum, vel fratris, vel sororis, et ceterorum efficiuntur. Atqui patrono legitimo tutore mortuo, liberi quoque eius legitimi sunt

grandson or granddaughter, &c., he obtains a statutory tutelage over them: whereas if this ascendant at his death leave male children behind him, they become the fiduciary tutors of their sons, or brother, or sister, or other relations. But when a patron who is a statutory tutor dies, his children also are

fiduciary tutelage, namely (1) that of a stranger who received by mancipation a free person from his ascendant under a *fiducia* or compact to manumit him:—for which see Gaius I. 166:—and (2) that named in the text, where the ascendant himself emancipated the descendant, and died before the emancipated person reached puberty. In this latter case the ascendant's heir was a fiduciary tutor, whereas the ascendant himself had been a statutory tutor. Yet Ulpian (XI. 5) calls the ascendant too a *fiduciary* tutor, and again in D. 26. 4. 3. avoids calling him *statutory*, saying, *vicem legitimi tutoris sustinet*: Gaius also (I. 172), though giving him the title of *legitimus*, implies that he regards him as a species of *fiduciarius*. In fact, he was essentially of that character; although law or custom had given him the higher powers of a statutory tutor; for if he manumitted his own son, he could only do so in the capacity of an adopting father, the Roman law never allowing direct manumission by an actual parent. He had therefore in any case, to transfer his son first of all to a stranger under a *fiducia*; and the stranger thereupon, according to the terms of the agreement entered into with the ascendant, would either manumit him immediately, or transfer him back, still subject to the *fiducia*, to his actual parent. The mancipator then, even if he were the

father, was but a *tutor fiduciarius*, i.e. emancipated in consequence of a *fiducia*; and his rights and duties were inheritable. An anomalous custom sprung up, or perhaps some enactment was made, that the father's dignity should be augmented to an equality with that of a *tutor legitimus*, but this custom or law did not go so far as to augment the dignity of the descendants of the father.

Moreover analogy or *elegantia* (to which such regard was always paid by Roman lawyers) would tend to the conclusion, that if the father of an unemancipated child had *patria potestas* over him, and yet could only transmit to an elder son of full age *tutela legitima* (to which he was entitled in his capacity of nearest *agnatus*) over a younger son under puberty; there must be a like diminution of authority when the rights of the father over an emancipated son devolved on another son not emancipated; and thus *tutela legitima* exercised by the father would become *tutela fiduciaria* when cast upon the brother.

On the same analogy it followed that the *tutela legitima* over a *libertus*, exercised by the *patronus*, passed intact to the son of the *patronus*; because the *dominica potestas*, if the slave had remained a slave, would have passed undiminished to the heir on the death of the original owner.

tutores: quoniam filius quidem defuncti, si non esset a vivo patre emancipatus, post obitum eius sui iuris efficeretur, nec in fratrum potestatem recideret, ideoque nec in tutelam; libertus autem, si servus mansisset, utique eodem iure apud liberos domini post mortem eius futurus esset. Ita tamen hi ad tutelam vocantur, si perfectae aetatis sint. quod nostra constitutio generaliter in omnibus tutelis et curationibus observari praecepit¹.

TIT. XX. DE ATILIANO TUTORE, ET EO QUI EX LEGE IULIA
ET TITIA DABATUR.

Si cui nullus omnino tutor fuerat, ei dabatur in urbe quidem Roma a Praetore urbano et maiore parte Tribunorum plebis tutor ex lege Atilia; in provinciis vero a Praesidibus provinciarum ex lege Iulia et Titia². (1.) Sed et si testamento tutor sub condicione aut die certo datus fuerat, quamdiu condicio aut

statutory tutors: for the son of the deceased, if he had not been emancipated by his father in his lifetime, would have become *sui iuris* at his father's death, and not have fallen under the *potestas* of his brothers, and therefore not under their tutelage: whilst the freedman, if he had remained a slave, would of course have stood in the same relation to his master's children after his master's death. But these persons are not called upon to exercise the tutorship unless they are of full age; a rule which a constitution of ours has ordained to be observed regarding all tutorships and curatorships¹.

TIT. XX. ON THE ATILIAN TUTOR AND THE TUTOR GIVEN
UNDER THE LEX IULIA ET TITIA.

Supposing a person had no tutor at all, one used to be given him in the city of Rome, in accordance with the Lex Atilia, by the Praetor Urbanus and the major part of the Tribunes of the Plebs, and in the provinces by the governors thereof, by virtue of the Lex Julia et Titia². 1. Moreover, if a tutor had been appointed by testament under a condition or (to act) after a certain day, so long as the condition was unfulfilled or the day

¹ C. 5. 30. 5. *Perfecta aetas*, it is scarcely necessary to observe, was

twenty-five years.

² Gaius I. 185.

dies pendebat¹, ex hisdem legibus tutor dari poterat. Item si pure datus fuerat, quamdiu nemo ex testamento heres existat, tamdiu ex hisdem legibus tutor petendus erat: qui desinebat tutor esse, si condicio extiterit aut dies venerit aut heres extiterit. (2.) Ab hostibus quoque tutore capto ex his legibus tutor petebatur, qui desinebat esse tutor, si is qui captus erat in civitatem reversus fuerat: nam reversus recipiebat tutelam iure postliminii².

3. Sed ex his legibus tutores pupillis desierunt dari, posteaquam primo Consules³ pupillis utriusque sexus tutores ex inquisitione dare coeperunt, deinde Praetores⁴ ex constitutionibus. nam suprascriptis legibus neque de cautione a tutoribus exigenda, rem salvam pupillis fore, neque de compellendis tutoribus ad tutelae administrationem quicquam cavetur. (4.) Sed hoc iure utimur, ut Romae quidem Praefectus urbi vel Praetor se-

not arrived¹, another tutor could be appointed under these same laws. Likewise, if a tutor had been appointed without condition, another tutor had to be applied for according to the same laws, for such time as no heir existed under the testament, but he ceased to be tutor if the condition came to pass, or the day arrived or an heir came into existence. 2. Also when a tutor was taken by the enemy, another tutor used to be applied for under the same laws, who ceased to be tutor if the captive returned into the state: for having returned he recovered his tutelage by the rule of postliminy².

3. But tutors have ceased to be given to pupils under these laws; since first the consuls³, and afterwards the praetors, began to appoint tutors to pupils of either sex after investigation, according to the provisions of certain imperial constitutions⁴. For by the *leges* aforementioned no provision was made either for taking security from the tutors that the property should be preserved for the pupils, or for compelling the tutors to administer duly their tutorship. 4. And so the present practice is that at Rome the Praefectus Urbi appoints tutors, or the

¹ The institution of the heir is the main point of a Roman testament and the foundation on which everything is built, so that until he accepts the inheritance, no bequest or direction can take effect.

² I. 12. 5.

³ See Sueton. *Claud.* 23: "Sanxit

ut pupillis extra ordinem tutores a consulibus darentur."

⁴ The *praectura tutelar*is was an office created by Marcus Antonius; see Capitol. *Marc.* 10: "praetorem tutelarem primus fecit, cum ante tutores a consulibus poscerentur, ut diligentius de tutoribus tractaretur."

cundum suam iurisdictionem¹, in provinciis autem Praesides ex inquisitione tutores crearent, vel magistratus² iussu Praesidum, si non sint magnae pupilli facultates. (5.) Nos autem per constitutionem nostram³ et huiusmodi difficultates hominum resecantes, nec expectata iussione Praesidum, disposuimus, si facultas pupilli vel adulti usque ad quingentos solidos valeat, Defensores⁴ civitatum una cum eiusdem civitatis religiosissimo antistite, vel apud alias publicas personas, vel magistratus, vel Iuridicum Alexandrinae civitatis, tutores vel curatores creare, legitima cautela secundum eiusdem constitutionis normam praestanda, videlicet eorum periculo qui eam accipiunt⁵.

6. Impuberes autem in tutela esse naturali iuri conveniens est, ut is qui perfectae aetatis non sit alterius tutela regatur.

Praetor, so far as his jurisdiction extends¹; whilst in the provinces the governors do so after inquiry, or the magistrates² by order of the governors, if the property of the pupil be not large. 5. But we by a constitution of ours³, clearing up men's doubts on such points, and causing that the order of the governors be no longer waited for, have settled that if the property of the pupil or adult amount to no more than 500 *solidi*, the *defensores*⁴ of the city (in conjunction with the right reverend prelate of the same, or in the presence of other public personages), or the magistrates, or the Juridicus in the city of Alexandria, shall appoint tutors or curators, care being taken to exact the usual statutory securities, in accordance with the tenour of the same constitution, to wit, at the risk of those who accept them⁵.

6. Now that those under puberty should be in tutelage is consistent with natural law, to the end he who is not of full age may be guided by the tutelage of another.

¹ The limits of the jurisdiction of the Praefectus Urbi and Praetor are thus laid down by ancient commentators: "Jurisdictio est haec: ut puta a patriciis usque ad illustres praefectus urbi tutores dat, ab illustribus usque ad inferiores praetor." For the duties of the Praefectus Urbi, see D. I. I. 12.

The orders of nobility in Justinian's time were (1) *nobilissimi*, i.e. princes of the blood royal, (2) *patricii*, (3) *spectabiles* and *illustres*, (4) *clarissimi*, (5) *perfectissimi*, (6) *egregii*. Below

these came the commons, *plebei* or *cives*.

² Sc. the municipal magistrates.

³ C. I. 4. 30.

⁴ The *defensores* were not, strictly speaking, magistrates, but had functions more resembling those of the ancient Roman tribunes: the *iuridicus Alexandrinae civitatis* was also different from a magistrate properly so called, because he was not elected by the inhabitants of the city but sent out from Rome. D. I. I. 20.

⁵ I. 1. 24. 2.

7. Cum igitur pupillorum pupillarumque tutores negotia gerunt, post pubertatem tutelae iudicio rationem reddunt¹.

TIT. XXI. DE AUCTORITATE TUTORUM.

Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria. Ut ecce si quid dari sibi stipuletur, non est necessaria tutoris auctoritas; quod si aliis pupilli promittant, necessaria est: namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. unde in his causis ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, locationibus conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem qui cum his contrahunt obligantur; at invicem pupilli non obligantur². (1.) Neque tamen hereditatem adire, neque bonorum possessionem³ petere, neque hereditatem ex fideicom-

7. Therefore, as the tutors of pupils, male or female, carry on their business, they are accountable to them in an action of tutelage after they have reached the age of puberty¹.

TIT. XXI. ON THE AUTHORIZATION OF TUTORS.

The authorization of a tutor is in some cases necessary for pupils, in some cases unnecessary. For instance, when a pupil stipulates for something to be given to him, the tutor's authorization is not necessary: but when pupils promise anything, it is necessary: for it has been ruled that they may make their condition better, even without their tutor's authorization; but not worse, except the tutor authorize them to do so. Therefore in those cases where mutual obligations arise, as in sales, hirings, guarantees, deposits, if the tutor's authorization be wanting, those who contract with the pupils are bound, whilst they themselves, on the other hand, are not bound². 1. Neither can they enter upon an inheritance or claim possession of goods³ or accept an inheritance given in trust for

¹ Gaius I. 189, 191.

² This does not mean that the portion of the agreement beneficial to the pupil can be enforced by the tutor, and the portion detrimental

to him be disclaimed: but that the tutor has power to elect whether the whole shall stand or the whole be set aside.

³ III. 9.

misso suscipere aliter possunt, nisi tutoris auctoritate, quamvis lucrosa sit, neque ullum damnum habeat¹. (2.) Tutor autem statim, in ipso negotio praesens, debet auctor fieri, si hoc pupillo prodesse existimaverit. post tempus vero aut per epistolam interposita auctoritas nihil agit. (3.) Si inter tutorem pupillumve iudicium agendum sit, quia ipse tutor in rem suam auctor esse non potest, non praetorius tutor², ut olim, constituitur, sed curator³ in locum eius datur, quo interveniente iudicium peragitur, et eo peracto curator esse desinit.

TIT. XXII. QUIBUS MODIS TUTELA FINITUR.

Pupilli pupillaeque cum puberes esse coeperint, tutela libe-

them, except by authorization of their tutor, even though it be profitable and involve no loss¹. 2. Also the tutor ought to authorize at the time and whilst present at the transaction, if he judge it a beneficial one for the pupil. But his act is without effect if he authorize afterwards or by letter. 3. When a suit has to be carried on between the tutor and the pupil, as the tutor cannot give authority in a matter touching himself, there is appointed in his stead not a praetorian tutor, as used to be the case², but a curator³, by whose agency the suit is prosecuted, and who ceases to be curator when it is ended.

TIT. XXII. IN WHAT WAY A TUTORSHIP IS ENDED.

Pupils, whether male or female, are released from tutelage

¹ The practical reason for this is that an inheritance is a complicated affair, and it is often impossible to decide off-hand whether it will be a source of profit or of loss; for a Roman heir, unless he were careful to take the necessary precautions, had to make good the debts of an insolvent inheritance: the technical reason is that entry on an inheritance was a formal act which the civil law would allow none under puberty to perform at their own discretion. The very derivation of *auctoritas*, viz. *augeo*, points to this, viz. that the tutor supplied the *judicium*,

or sound judgment, which the pupil lacked, although he had the *intellectus*, or understanding, to utter the words of acceptance. When the child was very young indeed, the tutor was allowed in cases of necessity to speak as well as authorize, but this was the exception rather than the rule.

² Gaius I. 176—184. The *tutor praetorius* was a deputy given when there was another tutor temporarily prevented from acting; a *tutor Atilianus* was appointed by the Praetor when there was no other tutor at all.

³ I. 23.

rantur¹. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis in masculis aestimari volebant. Nostra autem maiestas dignum esse castitati temporum nostrorum bene putavit, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere; et ideo sancta constitutione promulgata² pubertatem in masculis post quartum decimum annum completum illico initium accipere disposuimus, antiquitatis normam in feminis personis bene positam suo ordine relinquentes, ut post duodecimum annum completum viripotentibus esse credantur. (1.) Item finitur tutela, si arrogati sunt adhuc impuberes, vel deportati³. item si in servitutem pupillus redigatur vel ab hostibus fuerit captus. (2.) Sed et si usque ad certam conditionem datus sit testamento, aequè evenit, ut desinat esse tutor existente condicione. (3.) Simili modo finitur tutela morte vel tutorum, vel pupillorum. (4.) Sed et capitis deminutione tutoris⁴ per quam libertas vel civitas eius amittitur omnis tutela

when they arrive at puberty¹. And the ancients were inclined to have puberty reckoned in the case of males, not only by their years, but by the development of their bodies. We, however, have rightly judged it accordant with the purity of our times, that what seemed immodest even to the ancients in the case of females, namely an inspection of the person, should be so considered in reference to males also: and therefore by the promulgation of a sacred constitution² we have decided that puberty in males shall commence at once upon the completion of their fourteenth year, leaving as it stood the wise rule of antiquity regarding females, that they should be esteemed capable of marriage after their twelfth year. 1. Tutelage is also determined when persons under puberty are arrogated or deported³: and so it is if a pupil be reduced to slavery or taken by the enemy. 2. Besides, if a tutor be appointed by testament to continue till a certain condition come to pass, on the fulfilment of the condition he ceases to be tutor. 3. Tutelage in like manner is terminated by the death either of tutors or pupils. 4. Also any tutelage ends on the *capitis deminutio*⁴ of a tutor, whereby his liberty

¹ In earlier times women were kept under tutelage all their lives. Gaius I. 145, 196.

² C. 5. 60. 3.

³ I. 11. 1; I. 12. 1.

⁴ I. 16.

perit. minima autem capitis deminutione tutoris, veluti si se in adoptionem dederit, legitima tantum tutela perit¹; ceterae non pereunt. Sed pupilli et pupillae capitis deminutio, licet minima sit, omnes tutelas tollit. (5.) Praeterea qui ad certum tempus testamento dantur tutores, finito eo deponunt tutelam. (6.) Desinunt autem esse tutores qui vel removentur a tutela ob id, quod suspecti visi sunt, vel ex iusta causa sese excusant, et onus administrandae tutelae deponunt, secundum ea quae inferius proponemus².

TIT. XXIII. DE CURATORIBUS.

Masculi puberes et feminae viripotentes usque ad vicensimum quintum annum completum curatores accipiunt; qui, licet puberes sint, adhuc tamen huius aetatis sunt, ut negotia sua tueri non possunt³. (1.) Dantur autem curatores ab hisdem magistratibus a quibus et tutores⁴. sed curator testamento non datur, sed datus confirmatur⁵ decreto Praetoris vel Praesidis.

or citizenship is lost. But by the *minima capitis deminutio* of a tutor, for instance by his giving himself in adoption, only statutory tutelage¹ is destroyed, whilst the other varieties are not. But the *capitis deminutio* of a pupil, male or female, even though it be of the kind called *minima*, puts an end to tutelages of any description. 5. Moreover, tutors appointed in a testament for a specified time, resign their tutorship when the time has expired. 6. Lastly, those cease to be tutors who are either removed from their tutorship because they seem untrustworthy, or excuse themselves for a just cause and lay down the burden of administering the tutorship in the manner which we shall explain below².

TIT. XXIII. ON CURATORS.

Males who have reached puberty and women who are marriageable receive curators until their twenty-fifth year is completed: for although arrived at puberty they are still of such an age that they cannot defend their own interests³. 1. Curators are appointed by the same magistrates as tutors⁴. A curator is not given by testament, but if given is confirmed⁵

¹ I. 15, 17, 18.² I. 25, 26.³ A tutor's authority extended over both *person* and *property*: acurator's was limited to the protection of the ward's *property*.⁴ I. 20. 4.⁵ Not confirmed as a matter of

(2.) Item inviti adolescentes curatores non accipiunt, praeterquam in litem¹: curator enim et ad certam causam dari potest².
 (3.) Furiosi quoque et prodigi, licet maiores vigintiquinque annis sint, tamen in curatione sunt agnatorum ex lege duodecim tabularum³. sed solent Romae Praefectus urbi, vel Praetor, et

by a decree of the praetor or provincial governor. 2. Adolescents moreover do not receive curators against their will, except for a law-suit¹; for a curator may be appointed for a specific object as well (as generally)². 3. Madmen also and prodigals, although above the age of twenty-five, are nevertheless under the curation of their agnates, according to a law of the Twelve Tables³. But it is customary for the Praefectus

course, but confirmed unless the magistrate on investigation found that he was an unfit person.

¹ There has been great controversy as to this passage. The most consistent explanation of the origin of curatorship and of the rules regarding it is the following:

(1) By the Twelve Tables curators were to be appointed to madmen and prodigals of any age, but there was no provision as to adolescents.

(2) The *Lex Praetoria* or *Laetoria* (probably about the year B.C. 314) enacted that curators should be given to adolescents, i.e. persons between 14 and 25 years of age, if on investigation there seemed a necessity for it.

(3) The Praetor some time later began to appoint curators to minors on their mere application. Thus the investigation became unnecessary, and so it was no longer a disgrace, as it had been formerly, to receive a curator.

(4) Marcus Antoninus made it compulsory on adolescents to be under curation. The passage on which this statement rests is to be found in Capitol. *Marc. c. 10*: "de curatoribus vero quum ante non nisi ex Lege Laetoria, vel propter lasciviam, vel propter dementia, darentur, ita statuit, ut omnes adulti curatores acciperent causis non redditis."

The first question that arises is how are we to translate the words: "ex lege Laetoria, vel propter lasciviam, vel propter dementia"? and it must be at once apparent that the meaning is not that the Lex allowed curators to be given in cases of prodigality or madness, for that had been already done by the Twelve Tables; the translation therefore is: "either by the *Lex Laetoria*, or for prodigality, or for madness," i.e. in three distinct and separate cases.

But if M. Antoninus made it compulsory on all adolescents to have a curator, how are we to explain the words in the text "inviti adolescentes curatores non accipiunt"? Heineccius holds that although Marcus left the rule standing that no adolescent was to have a curator forced upon him, still the adolescent was constrained to seek one, by that emperor debarring him from bringing or defending a suit personally: there is, however, a simpler explanation, as it seems to us; which is this: that although the adolescent must have a curator, he could himself make the selection, subject to the magistrate's approbation; and this, we may presume, was not to be withheld without sufficient cause.

² Differing herein from a tutor, see I. 14. 4.

³ Tab. v. l. 7.

in provinciis Praesides ex inquisitione eis dare curatores¹. (4.) Sed et mente captis et surdis et mutis et qui morbo perpetuo laborant, quia rebus suis superesse non possunt, curatores dandi sunt. (5.) Interdum autem et pupilli curatores accipiunt, ut puta si legitimus tutor non sit idoneus, quia habenti tutorem tutor dari non potest. item si testamento datus tutor, vel a Praetore vel a Praeside, idoneus non sit ad administrationem, nec tamen fraudulentè negotia administret, solet ei curator adiungi. item in locum tutorum qui non in perpetuum, sed ad tempus a tutela excusantur, solent curatores dari².

6. Quodsi tutor adversa valetudine vel alia necessitate impeditur, quo minus negotia pupilli administrare possit, et pupillus vel absit vel infans sit, quem velit actorem periculo ipsius Praetor, vel qui provinciae praeerit, decreto constituet³.

Urbi or Praetor at Rome, and for the governorꝝ in the provinces to appoint curators to them after an inquiry¹. 4. Curators have also to be given to idiots, deaf persons, dumb persons, and those afflicted with chronic disease, because they are not competent to manage their own business. 5. Pupils too, occasionally receive curators, for instance, if their statutory tutor be an unfit person; because a tutor cannot be given to one who has a tutor already. Also when a tutor appointed by testament, or by the praetor, or the governor, is not competent to administer, and yet is not conducting the business fraudulently, a curator is usually associated with him. Also curators are usually appointed to take the place of those tutors who are excused from their tutorship not permanently, but only for a time².

6. But if a tutor be prevented by ill-health or other emergency from administering the pupil's affairs, and the pupil be either absent or an infant, the praetor or the governor of a province may by an order appoint as agent at the tutor's risk any person he (the tutor) desires³.

¹ See Ulp. XII. 3, which plainly proves that the law would not allow the agnates to be tutors to a child appointed heir by his father, although they were statutory tutors, in case the father died intestate.

² In all these cases a *tutor prae-*

torius would have been appointed in Gaius' time: but this variety of tutor (a temporary deputy) no longer existed. See App. (D) "On Tutors," in our edition of Gaius.

³ The *actor* worked under the tutor's direction, and therefore the

TIT. XXIV. DE SATISDATIONE TUTORUM VEL CURATORUM.

Ne tamen pupillorum pupillarumve et eorum qui quaeve in curatione sunt negotia a tutoribus curatoribusve consumantur aut deminuantur, curat Praetor, ut et tutores et curatores eo nomine satisdant. Sed hoc non est perpetuum. nam tutores testamento dati satisdare non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; item ex inquisitione tutores vel curatores dati satisdatione non onerantur, quia idonei electi sunt¹. (1.) Sed et si ex testamento vel inquisitione duo pluresve dati fuerint, potest unus offerre satis de indemnitate pupilli vel adolescentis et contutori vel concuratori praeferrī, ut solus administret, vel ut contutor satis offerens praeponatur ei et ipse solus administret. itaque per se non

TIT. XXIV. ON THE GIVING OF SURETIES BY TUTORS AND CURATORS.

To prevent, however, the property of male or female pupils and of those who are under curation from being wasted or diminished by their tutors or curators, the praetor provides that both tutors and curators shall furnish sureties on this behalf. But the rule is not of universal application. For tutors appointed by testament are not compelled to furnish sureties, because their integrity and carefulness are borne witness to by the testator himself: also tutors and curators appointed after inquiry are not burdened with the furnishing of sureties, because suitable persons are selected¹. 1. Yet if two or more be appointed by testament or after inquiry, any one of them may tender sureties for the indemnification of the pupil or adolescent and be preferred to his fellow-tutor or fellow-curator, so that he may administer alone, or so that his fellow-tutor on tendering (sureties to the same amount) may be preferred to him and administer solely. Thus

tutor was responsible for his proceedings; whereas a *curator* acted independently, so that the tutor had no responsibility for what he did. If the pupil were present and able to speak for himself, he could nominate the *actor*, and no ratifica-

tion by the magistrate was needful; although the tutor by confirming the nomination (which of course required his *auctoritas*) became responsible.

¹ Gaius I. 199, 200.

potest petere satis a contutore vel concuratore suo ; sed offerre debet, ut electionem det contutori suo, utrum velit satis accipere, an satis dare. quodsi nemo eorum satis offerat, si quidem adscriptum fuerit a testatore, quis gerat, ille gerere debet: quodsi non fuerit adscriptum, quem maior pars elegerit ipse gerere debet: ut edicto Praetoris cavetur. sin autem ipsi tutores dissenserint circa eligendum eum vel eos qui gerere debent, Praetor partes suas interponere debet. Idem et in pluribus ex inquisitione datis probandum est, id est, ut maior pars eligere possit per quem administratio fieret.

2. Sciendum est autem non solum tutores vel curatores pupillis et adultis ceterisque personis ex administratione teneri¹; sed etiam in eos qui satisfactiones accipiunt² subsidiariam actionem esse, quae ultimum eis praesidium possit afferre. subsidiaria autem actio datur in eos qui vel omnino a tutoribus vel curatoribus satisfacere non curaverint, aut non idonee passi

he cannot actually (*per se*) demand sureties from his fellow-tutor or fellow-curator ; but he must make a tender, so as to give his fellow-tutor the election of taking sureties or giving sureties. If, however, none of the tutors offer sureties, then supposing it has been specified by the testator which is to act, that one must act: but if no such specific appointment has been made, he whom the majority elect must act, according to the provisions of the Praetor's Edict. But should the tutors disagree about the election of the one or more who are to act, the Praetor must interfere. This rule too must be maintained in the case where several are appointed after inquiry, that is, the major part may elect by whom the administration is to be conducted.

2. We must further note that not only are the tutors or curators liable in respect of their administration to the pupils, adolescents or other persons¹, but also that a subsidiary action, which furnishes them with a last protection, exists against those who approve of the sureties². This subsidiary action is granted against such as have either neglected altogether to take sureties from the tutors or curators, or have allowed insufficient security to be given. And this action, accord-

¹ I. 23. 3 and 4.

² That is against the appointing magistrate, if he appointed *sine inquisitione*, which, as Justinian has

already explained, is the same as saying "if he be an inferior magistrate." See I. 20. 4 and 5, and § 4 below.

essent caveri. quae quidem tam ex prudentium responsis quam ex constitutionibus imperialibus et in heredes eorum extenditur¹; (3.) quibus constitutionibus et illud exprimitur, ut nisi caveant tutores vel curatores, pignoribus captis coërcantur. (4.) Neque autem Praefectus urbi, neque Praetor, neque Praeses provinciae, neque quis alius cui tutores dandi ius est², hac actione tenebitur; sed hi tantummodo qui satisfactionem exigere solent.

TIT. XXV. DE EXCUSATIONIBUS TUTORUM VEL CURATORUM.

Excusantur autem tutores vel curatores variis ex causis³. plerumque autem propter liberos, sive in potestate sint, sive emancipati. si enim tres liberos superstites Romae quis habeat, vel in Italia quatuor, vel in provinciis quinque, a tutela vel cura possunt excusari exemplo ceterorum munerum: nam

ing to the opinions of the jurists as well as according to imperial constitutions, is available also against the heirs of the magistrates¹. 3. By the same constitutions it is further laid down that if tutors or curators fail to give sureties, they may be compelled to do so by pledges being taken from them. 4. But neither the Praefectus Urbi, nor the Praetor, nor the governor of a province, nor any one else who has the right of appointing tutors², will be liable to this action, but only those whose custom it is to require sureties.

TIT. XXV. ON THE GROUNDS FOR EXCUSE OF TUTORS OR CURATORS.

Tutors or curators are excused for various reasons³: but most frequently on the score of their children, whether under *potestas* or emancipated. For if a resident at Rome have three children living, or a resident in Italy four, or a resident in the provinces five, he can be excused from a tutorship or curatorship,

¹ C. 5. 75. 2. But from D. 27. 8, 6, it would seem that the magistrates themselves were liable for negligence of a trivial kind; their heirs only when the negligence had been gross.

² Sc. an original, not a delegated right. See I. 20. 4.

³ There is nothing analogous to this title in Ulpian or Gaius, because in their days tutorship was a voluntary office. Ulp. xi. 17.

et tutelam vel curam placuit publicum munus esse. sed adoptivi liberi non prosunt; in adoptionem autem dati naturali patri prosunt. item nepotes ex filio prosunt, ut in locum patris succedant¹; ex filia non prosunt. filii autem superstites tantum ad tutelae vel curae muneris excusationem prosunt; defuncti non prosunt. sed si in bello amissi sunt, quaesitum est an prosint. et constat eos solos prodesse qui in acie amittuntur: hi enim, quia pro republica ceciderunt, in perpetuum per gloriam vivere intelleguntur. (1.) Item divus Marcus in semenstribus² rescriptis, eum qui res fisci administrat a tutela vel cura, quamdiu administrat, excusari posse. (2.) Item qui reipublicae causa absunt a tutela et cura excusantur. Sed et si fuerunt tutores vel curatores, deinde reipublicae causa abesse coeperunt, a tutela et cura excusantur, quatenus reipublicae causa absunt, et interea curator loco eorum datur. qui si reversi fuerint,

just as from other offices; for it has been ruled that both tutorship and curatorship are public offices. Adopted children, however, do not avail, though children given in adoption count in favour of their actual father. So too grandchildren by a son avail, supposing they succeed into their father's place¹; those by a daughter do not avail. And it is only living children who furnish an excuse from the office of tutor or curator; those dead do not furnish one. Still it has been questioned whether such as are lost in war may not be reckoned: and it has been decided that those only may be counted who are lost in the field of battle, for these are considered to live for ever in glory through falling on behalf of their country. 1. The late emperor Marcus also published a rescript in his *Semenstria*², that an official of the treasury, so long as he continued employed, might claim exemption from tutorship and curatorship. 2. Those too who are absent on public business are excused from tutorship and curatorship. And further, if they have become tutors or curators, and afterwards leave home on public business, they are excused from their tutorship or curatorship so long as their absence on public business continues, and meantime a curator is appointed in their stead. But when they return they receive again the

¹ Sc. by *quasi-agnation*. See II. 17. 1.

² Volumes of rescripts published half-yearly.

recipiunt onus tutelae, nec anni habent vacationem, ut Papi-
 nianus libro quinto responsorum rescripsit: nam hoc spatium
 habent ad novas tutelae vocati. (3.) Et qui potestatem ali-
 quam habent excusare se possunt, ut divus Marcus rescripsit,
 sed coeptam tutelam deserere non possunt. (4.) Item propter
 litem quam cum pupillo vel adulto tutor vel curator habet
 excusare se nemo potest; nisi forte de omnibus bonis vel
 hereditate controversia sit. (5.) Item tria onera tutelae non
 affectatae, vel curae, praestant vacationem quamdiu admini-
 strantur: ut tamen plurium pupillorum tutela vel cura eorun-
 dem bonorum, veluti fratrum, pro una computetur. (6.) Sed
 et propter paupertatem excusationem tribui, tam divi fratres¹,
 quam per se divus Marcus rescripsit, si quis imparem se oneri
 iniuncto possit docere. (7.) Item propter adversam valetudi-
 nem propter quam nec suis quidem negotiis superesse potest,
 excusatio locum habet. (8.) Similiter eum qui literas nesciret

burden of their tutorship, and, according to a rescript of Papi-
 nian in the fifth book of his Responses, they have not even
 a year's respite: although this space of time is allowed when
 they are called to new tutorships. 3. Also persons who
 hold any position of authority can excuse themselves, as the
 late emperor Marcus stated in a rescript; but they cannot
 relinquish a tutorship already undertaken. 4. Again, no
 tutor or curator can excuse himself by reason of a law-suit
 which he has against his pupil or adolescent; unless the suit
 happen to be about the whole estate or inheritance. 5. The
 burden of three tutorships or curatorships, if unsolicited, fur-
 nishes an excuse, so long as they are in course of adminis-
 tration; provided only that the tutelage of several pupils, or
 the curation of the goods of the same, as of brothers for in-
 stance, shall be counted for one only. 6. That an exemp-
 tion should be granted on the score of poverty, when a man
 can prove himself incapable of the burden laid upon him,
 was laid down in rescripts both by the deified brothers¹ to-
 gether and by Marcus alone. 7. Exemption is also allow-
 able on account of ill-health, if of such kind that it prevents
 a man attending even to his own business. 8. In like man-

¹ This title is always given by the law-writers to the emperors Marcus Antoninus and Lucius Verus.

excusandum esse divus Pius rescripsit; quamvis et imperiti literarum possunt ad administrationem negotiorum sufficere¹. (9.) Item si propter inimicitias aliquem testamento tutorem pater dederit, hoc ipsum praestat ei excusationem; sicut per contrarium non excusantur qui se tutelam patri pupillorum administraturos promiserunt. (10.) Non esse autem admittendam excusationem eius qui hoc solo utitur, quod ignotus patri pupillorum sit, divi fratres rescripserunt. (11.) Inimicitiae quas quis cum patre pupillorum vel adutorum exercuit, si capitales² fuerunt, nec reconciliatio intervenit, a tutela vel cura solent excusari. (12.) Item si quis status controversiam a pupillorum patre passus est, excusatur a tutela. (13.) Item maior septuaginta annis a tutela vel cura se potest excusare.

ner the late emperor Pius issued a rescript that a man unable to read was to be excused; although persons unskilled in reading can manage business¹. 9. Again, if a father have through enmity appointed a person tutor in his testament, this very fact furnishes him with an excuse: just as, in the contrary case, those are never excused who have promised the father that they will conduct the tutorship of the pupils. 10. The deified brothers issued a rescript to the effect that a man's excuse is not to be admitted when he urges the single fact that he was unknown to the father of the pupils. 11. Enmity which any one has entertained towards the father of pupils or adolescents, supposing it to have been of a deeply rooted character² and no reconciliation to have taken place, is usually a cause of excuse from tutorship or curatorship. 12. So too, if any one has had his status called into question by the father of the pupils, he is excused from the tutorship. 13. A person who is more than seventy years of age can excuse himself from a tutorship or curatorship: and persons

¹ This may either mean that Pius granted exemption in a special instance, though refusing to grant it generally, because he held that illiterate persons are not necessarily bad men of business; or granted it universally, although the exemption was not defensible on the same principle as that for ill-health, previous-

ly named. Theophilus takes the latter view, but many commentators incline to the former.

² Capitalis: "proprie, ipsum caput insectando, i.e. (ex usu loquendi juridico) vitam, libertatem, omnemve statum petendo." Schrader. See also Dirksen's *Manuale Latinitatis* on the word.

Minores autem viginti et quinque annis olim quidem excusabantur: a nostra autem constitutione¹ prohibentur ad tutelam vel curam aspirare, adeo ut nec excusationis opus fiat. qua constitutione cavetur, ut nec pupillus ad legitimam tutelam vocetur, nec adultus; cum erat incivile eos qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum tutelam vel curam subire. (14.) idem et in milite observandum est, ut nec volens ad tutelae munus admittatur. (15.) Item Romae grammatici rhetores et medici et qui in patria sua id exercent et intra numerum sunt, a tutela vel cura habent vacationem².

16. Qui autem se vult excusare, si plures habeat excusationes, et de quibusdam non probaverit, aliis uti intra tempora non prohibetur. Qui autem excusare se volunt non appel-

under twenty-five used formerly to be excused: but by a constitution of ours¹ they are prohibited from laying claim to a tutorship or curatorship, and therefore there is no need of excuse. In that constitution it is provided that a pupil or adolescent shall not even be called upon to undertake a statutory tutorship, for it is contrary to our law that those who are known to require the aid of other people in managing their own affairs, and who are ruled by others, should undertake the tutelage or curation of third parties. 14. The same rule must be maintained as to a soldier, so that not even if he desire it is he to be admitted to the office of tutor. 15. Also grammarians, rhetoricians and physicians at Rome, and those who follow these professions in their native land and are included in the licensed number, have an exemption from tutorship or curatorship².

16. A man who wishes to excuse himself, supposing he have several excuses and fail to prove some of them, is not prohibited from bringing forward the others within the prescribed time. When people wish to excuse themselves, they

¹ C. 5. 30. 5.

² We learn from a passage extracted from Modestinus in D. 27. 1. 6. 2, that the numbers of the licensed and exempted physicians, ophiasts and grammarians depended

on the size and importance of the city: these numbers being 10, 5 and 5 in the capital of a province; 7, 4 and 4 in cities having a "forum caesarum vel loca judiciorum," and 5, 3 and 3 in smaller cities.

lant¹, sed intra dies quinquaginta continuos, ex quo cognoverunt, excusare se debent, cuiuscumque generis sunt, id est qualitercumque dati fuerint tutores, si intra centensimum lapidem sunt ab eo loco ubi tutores dati sunt; si vero ultra centensimum habitant, dinumeratione facta viginti millium diurnorum et amplius triginta dierum. quod tamen, ut Scaevola dicebat², sic debet computari, ne minus sint quam quinquaginta dies. (17.) Datus autem tutor ad universum patrimonium datus esse creditur³. (18.) Qui tutelam alicuius gessit invitus curator eiusdem fieri non compellitur, in tantum, ut, licet pater qui testamento tutorem dederit adiecit se eundem curatorem dare, tamen invitum eum curam suscipere non cogendum divi Seve-

do not appeal¹; but whatever kind of tutors they be, i.e. in whatever way they have been appointed, they are bound to put in their excuse within fifty consecutive days from the time they had knowledge, supposing they are within the hundredth milestone from the place where they were appointed: but if they dwell beyond the hundredth, they may do so according to a reckoning of twenty miles a day and thirty days over: but still, as Scaevola said², the computation ought to be so made that there be not less than fifty days allowed. 17. A tutor, when appointed, is considered to be appointed for the whole estate³. 18. A person who has acted as tutor to any one is not obliged, if unwilling, to be curator to the same person; so much so that although the father, who appointed the tutor by his testament, added further that he made the same man curator, yet the late emperors Severus and Antoninus declared in a rescript that he must not be compelled to undertake the

¹ The general rule in cases where exemption was claimed was that the appointment should be accepted in the first instance at the hands of the subordinate magistrate, and then be appealed against before the superior court: in tutorships, however, it was different, the objection being raised at once and appointment declined originally. See D. 49. 4. 1. 2, D. 50. 5. 1. 1. If the excuse tendered to the subordinate magistrate by a tutor were disallowed, then and not till then was an appeal allowable. D. 49. 4. 1. 1.

² D. 27. 1. 13. 2.

³ This means that a tutor who had allowed the time for making excuse to elapse was tutor to the whole property, however scattered it might be. But from D. 27. 1. 21. 2, we see that a tutor who used proper diligence in tendering his excuse would be absolved from the supervision of property more than a hundred miles from his residence, and have co-tutors associated with him whose functions would be confined to the management of these outlying estates.

rus et Antoninus rescripserunt¹. (19.) Iidem rescripserunt² maritum uxori suae curatorem datum excusare se posse, licet se immisceat. (20.) Si quis autem falsis allegationibus excusationem tutelae meruit, non est liberatus onere tutelae³.

TIT. XXVI. DE SUSPECTIS TUTORIBUS VEL CURATORIBUS.

Sciendum est suspecti crimen ex lege duodecim tabularum descendere. (1.) Datum est autem ius removendi suspectos tutores Romae Praetori et in provinciis Praesidibus earum et Legato Proconsulis⁴. (2.) Ostendimus qui possunt de suspecto cognoscere: nunc videamus qui suspecti fieri possunt. Et quidem omnes tutores possunt, sive testamentarii sint, sive alterius generis tutores. quare etsi legitimus sit tutor, accusari poterit. quid si patronus? adhuc idem erit dicendum⁵; dum-

curation against his will¹. 19. They also declared in another rescript² that a husband appointed curator to his wife may excuse himself, even though he meddle with the business. 20. Still if any one has obtained exemption from a tutorship by false assertions, he is not liberated from the responsibility of the office³.

TIT. XXVI. ON SUSPECTED TUTORS OR CURATORS.

We must remark that the right of accusing one who is suspected springs from a law of the XII. Tables. 1. But the power of removing suspected tutors is at Rome entrusted to the Praetor, and in the provinces to their governors or to the deputy of the Proconsul⁴. 2. We have shewn who can take cognizance of a suspected person, let us now consider who can be suspected. The fact is all tutors can, whether they be testamentary tutors or of the other kind: so that a tutor can be accused even if he be statutory. But what if he be a patron? Still we must say the same⁵, provided only we re-

¹ This rescript is not extant, but one of Diocletian and Maximian to the same effect is found in C. 5. 62. 20.

² C. 5. 62. 4. The spirit of this enactment accords with that of C. 5. 34. 2, where a husband is debarred from acting as curator to his wife;

and with that of C. 5. 6, where a curator is forbidden to marry his ward.

³ "Tutor quidem non est; periculum tamen tutelae ad eum pertinet." D. 23. 2. 60.

⁴ D. 26. 10. 1. 4.

⁵ The patron could not be im-

modo meminerimus famae patroni parcendum, licet ut suspectus remotus fuerit. (3.) Consequens est, ut videamus qui possunt suspectos postulare. Et sciendum est quasi publicam esse hanc actionem¹, hoc est omnibus patere. quinimo et mulieres admittuntur² ex rescripto divorum Severi et Antonini, sed hae solae quae pietatis necessitudine ductae ad hoc procedunt, ut puta mater; nutrix quoque et avia possunt, potest et soror; sed et si qua mulier fuerit, cuius Praetor propensam pietatem intellexerit non sexus verecundiam egredientis, sed pietate productae non continere iniuriam pupillorum, admittet eam ad accusationem. (4.) impuberes non possunt tutores suos suspectos postulare; puberes autem curatores suos ex consilio

member that a patron's reputation is to be spared, even though he be removed as suspected. 3. The next thing for us to consider is, who can accuse suspected tutors. And we must remark that this action is of a quasi-public character¹, that is to say, it is open to all. In fact even women are allowed to bring it², in accordance with a rescript of the late emperors Severus and Antoninus, but only those who are induced by the tie of natural affection to take such proceedings, as for instance a mother; a nurse also and a grandmother can bring the action, and so can a sister: and besides if there be any woman whose genuine affection the praetor perceives, and who does not outstep the modesty of her sex, but is led by her love not to submit to the wrong of the pupils, the praetor will admit her also to bring the accusation. 4. Those under puberty cannot implead their tutors as suspected, but those

pleaded as suspected, but proceedings could be instituted against him which had equal effect in protecting the property: as we see from C. 5. 55. 1: "contra patronum famosam actionem instituere non potuisti: providere tamen ne quid tutelae deesset, necessariis postulationibus apud eum cujus de ea re jurisdictio fuit, potuisti." That is to say there is an *actio in factum* though not an *actio famosa*.

¹ The action is not *public*, though dealing with a criminal act; for, as is stated in D. 48. 1. 1: "non om-

nia judicia in quibus crimen vertitur, et publica sunt, sed ea tantum quae ex legibus judiciorum publicorum veniunt:" and this proceeding was founded on the Praetorian edict. Technically therefore the action was not *public*; yet practically it was, so Justinian properly styles it *quasi-public*.

² Women were debarred from public business in general, including the prosecution of suits; D. 50. 17. 2: but there were exceptions, for which see D. 3. 3. 41, D. 48. 2. 1, and 48. 2. 2. pr.

necessariorum suspectos possunt arguere : et ita divi Severus et Antoninus rescripserunt. (5.) Suspectus est autem qui non ex fide tutelam gerit, licet solvendo est, ut Iulianus quoque rescripsit. Sed et ante quam incipiat gerere tutelam tutor, posse eum quasi suspectum removeri idem Iulianus rescripsit¹, et secundum eum constitutum est². (6.) Suspectus autem remotus, si quidem ob dolum, famosus est ; si ob culpam, non aequè. (7.) Si quis autem suspectus postulatur, quoad cognitio finiatur, interdicatur ei administratio, ut Papiniano visum est. (8.) Sed si suspecti cognitio suscepta fuerit, posteaque tutor vel curator decesserit, extinguitur cognitio suspecti³. (9.) Si quis tutor copiam sui non faciat, ut alimenta pupillo decernantur, cavetur epistola divorum Severi et Antonini, ut in possessionem bonorum eius pupillus mittatur ; et quae mora deteriora futura sunt dato curatore distrahi iubentur. ergo ut

above puberty can under the advice of their kindred accuse their curators as suspected : and the late emperors Severus and Antoninus made a rescript to this effect. 5. One who does not execute a tutorship faithfully is a suspected person, even though he be solvent, as Julian also defined. The same Julian further laid down that a tutor can be removed as suspected even before he has begun to administer his tutorship¹, and a constitution has been framed in accordance with his opinion². 6. A person removed as suspected is infamous, if the removal be for fraud, but not so if it be for negligence. 7. If any one be impleaded as suspected, administration is forbidden him till the investigation is completed, according to the view held by Papinian. 8. But if an investigation be commenced against a suspected person, and he die subsequently, whether he be tutor or curator, the investigation is brought to an end³. 9. If any tutor fail to present himself for the purpose of maintenance being assigned to the pupil, it is provided by a rescript of the late emperors Severus and Antoninus that the pupil is to be put into possession of his property ; and those effects which would be deteriorated by delay are ordered to be sold by the curator (in such case)

¹ Ulpian maintained the contrary, D. 26. 10. 3. 5.

² C. 5. 43. 3.

³ The *cognitio suspecti*, being for

the tutor's removal, is obviously ended by his death ; but there could still be an action for account against his heirs.

suspectus removeri poterit qui non praestat alimenta¹. (10.) Sed si quis praesens negat propter inopiam alimenta non posse decerni, si hoc per mendacium dicat, remittendum eum esse ad Praefectum urbis puniendum placuit², sicut ille remittitur qui data pecunia ministerium tutelae redemerit. (11.) Liber-
tus quoque, si fraudulenter gessisse tutelam filiorum vel nepo-
tum patroni probetur, ad Praefectum urbis remittetur punien-
dus³. (12.) Novissime sciendum est eos qui fraudulenter
tutelam vel curam administrant, etiam si satis offerant, remo-
vendo a tutela : quia satisfactio propositum tutoris malevolum
non mutat, sed diutius grassandi in re familiari facultatem
praestat⁴. (13.) Suspectum enim eum putamus qui moribus
talis est, ut suspectus sit : enimvero tutor vel curator, quamvis
pauper est, fidelis tamen et diligens, removendus non est
quasi suspectus⁵.

appointed¹. Therefore a tutor who does not provide main-
tenance may be removed as suspected. 10. But should
the tutor put in an appearance, and declare that no main-
tenance can be decreed because of the poverty (of the estate),
and should he assert this falsely, it is ruled that he must be
handed over to the Praefectus Urbi to be punished², in like
manner as a man is handed over who has procured the ad-
ministration of a tutelage by a gift of money. 11. A freed-
man also, if proved to have managed fraudulently the tutelage
of the sons or grandsons of his patron, is handed over for punish-
ment to the Praefectus Urbi³. 12. Finally we must remark
that those who administer a tutorship or curatorship fraudu-
lently are to be removed from their office even though they
tender sureties ; because the offer of sureties does not alter
the evil purpose of the tutor, but gives him an opportunity
of injuring the estate for a longer time⁴. 13. For we hold
a man suspected when he is such in character as to be deserving
of suspicion : whereas a tutor or curator is not to be removed
as suspected, although he be poor, if at the same time he be
faithful and diligent⁵.

¹ Ulpian in D. 26. 10. 7. 2.

² Because the Praetor has no cri-
minal jurisdiction. D. 26. 10. 3. 15.

³ D. 26. 10. 2.

⁴ D. 26. 10. 5, 6.

⁵ D. 26. 10. 8.

BOOK II.

TIT. I. DE RERUM DIVISIONE.

Superiore libro de iure personarum exposuimus; modo videamus de rebus: quae vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur. quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique acquiruntur, sicut ex subiectis apparebit.

1. Et quidem naturali iure communia sunt omnium haec: aër, aqua profluens, et mare, et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis absteineat, quia non sunt iuris¹ gentium sicut et mare. (2.) Flumina autem omnia et portus publica

TIT. I. ON THE DIVISION OF THINGS.

In the preceding book we have treated of the law of persons: now let us turn our attention to things: which are either within our patrimony or without it. For some things are by the law of nature common to all men, some things are public, some belong to a corporation, some to no one, and most to individuals; and these last are acquired by men in various manners, as will appear from what follows.

1. By the law of nature then the following things are common to all men; air, running water, the sea, and consequently the shores of the sea. No one therefore is debarred from approaching the sea-shore, provided only he does not harm houses, monuments or buildings, because these are not subject to the law of nations¹ as the sea is.

2. All rivers and ports are public, and therefore the right

¹ Schrader says *jus* in this passage = *dominium*, and translates "these are not common property of all the

world," in agreement with Theophilus, who renders the Latin into οὐ κοινὰ πάντων ἀνθρώπων.

sunt. ideoque ius piscandi omnibus commune est in portu fluminibusque¹. (3.) Est autem litus maris, quatenus hibernus fluctus maximus excurrit. (4.) Riparum quoque usus publicus est iuris gentium² sicut ipsius fluminis: itaque navem ad eas applicare, funes ex arboribus ibi natis religare, onus aliquid in his reponere, cuilibet liberum est, sicuti per ipsum flumen navigare. sed proprietates earum illorum est quorum praediis adhaerent: qua de causa arbores quoque in hisdem natae eorundem sunt. (5.) Litorum quoque usus publicus iuris gentium est, sicut ipsius maris³, et ob id quibuslibet liberum est casam ibi imponere in qua se recipiant, sicut retia siccare et ex mari deducere. proprietates autem eorum potest intelligi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel arena. (6.) Universitatis sunt, non singulorum,

of fishing in a port or in rivers is common to all men¹. 3. The sea-shore is determined by the line reached by the highest winter-tide. 4. The public use of river-banks is also a part of the law of nations², in like manner as the use of the river itself is: therefore anyone is as much at liberty to moor a vessel to them, to tie ropes to the trees growing thereon, or to place any cargo upon them, as he is to sail along the river itself: but the ownership of them belongs to the proprietors of the adjacent lands, for which reason the trees that grow there belong to the same persons. 5. The public use of the sea-shore is also a part of the law of nations, just as is the use of the sea itself³: and therefore any person is as much at liberty to place a cottage there, into which to retreat, as he is to dry his nets there or draw them out of the sea. Yet the ownership of the shore we must consider to belong to no one, but to be subject to the same rules as the sea itself and the ground or sand beneath it. 6. Such things as theatres, racecourses and

¹ Justinian is here inconsistent in his terminology: rivers, roads, &c., are *publica*, i. e. common to the inhabitants of the state, not *communia*, i. e. common to all mankind. See Vimnius' note on this passage.

² The meaning is not that the use of rivers is open to all the world; but that by the custom of all the world the use is open to all mem-

bers of the states through whose territory the river runs.

³ The use of the open sea is common to all the world: the use of the sea-shore and of that portion of the sea close to the shore is by universal agreement public, i. e. open to all members of the nation occupying the adjacent country, but not open to the world in general.

veluti quae in civitatibus sunt, ut theatra, stadia et similia, et si qua alia sunt communia civitatum.

7. Nullius autem sunt res sacrae et religiosae et sanctae : quod enim divini iuris est id nullius in bonis est. (8.) Sacra sunt quae rite et per Pontifices Deo consecrata sunt, veluti aedes sacrae et dona quae rite ad ministerium Dei dedicata sunt, quae etiam per nostram constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum¹. si quis vero auctoritate sua quasi² sacrum sibi constituerit, sacrum non est, sed profanum. locus autem in quo sacrae aedes aedificatae sunt etiam diruto aedificio adhuc sacer manet, ut et Papinianus rescripsit³.

9. Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum. in communem autem locum purum invito socio inferre non licet ; in commune vero sepulcrum etiam invitis ceteris licet inferre. item si alienus usus-

the like which are in cities, as well as other common property of cities, belong to the corporation and not to individuals.

7. Things sacred, religious and hallowed belong to no one, for that which is matter of divine right is the property of none.

8. Those things are *sacred* which have been consecrated to God in due form by the Pontiffs, for instance sacred buildings and gifts properly dedicated to God's service; which we have also by a constitution of ours forbidden to be alienated or encumbered, except for the purpose of ransoming captives¹. But if anyone on his own authority make a thing quasi-sacred in his own regard², this thing is not sacred but profane. The land on which a sacred edifice has been erected remains sacred still, even after the building has been pulled down, as Papinian also stated³.

9. Any one makes a place *religious* at his own pleasure by burying a corpse on his own ground. But he may not bury a corpse on ground owned in common and as yet undefiled, without the leave of his partner: though he may even against the will of the other proprietors bury in a tomb that is common property. Also if the usufruct⁴ belong to another person, it is

¹ C. I. 2. 21.

² That is to say, if he attempt to affix a sacred character. "Vox quasi

improprietas et fictionis abusionisve significativa est." Brissonius.

³ D. 18. 1. 73. pr. ⁴ See II. 4.

fructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. in alienum locum concedente domino licet inferre ; et licet postea ratum habuerit quam illatus est mortuus, tamen religiosus locus fit.

10. Sanctae quoque res, veluti muri et portae, quodammodo divini iuris sunt, et ideo nullius in bonis sunt. ideo autem muros sanctos dicimus, quia poena capitis constituta sit in eos qui aliquid in muros deliquerint. ideo et legum eas partes quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus¹.

11. Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod sicut diximus appellatur ius gentium²; quarundam iure

ruled that the owner cannot without the usufructuary's consent make the place religious. It is lawful to bury on another's ground with the owner's consent, and the place is religious even though he only ratified the proceeding after the corpse had been placed there.

10. Hallowed things also, for instance, city-walls and gates, are in some degree subjects of divine right, and therefore are not included in any man's property. And we speak of walls as hallowed, because a capital penalty is declared against those who commit any offence in respect of them. For the same reason we also give the name of "sanctions" to those parts of laws in which we appoint penalties to be inflicted on persons who act contrary to the laws¹.

11. Things become the property of individuals in many ways: for we obtain the ownership of some by the natural law, which, as we have said, is styled *jus gentium*²; of some by the

¹ We have so far been dealing with *res extra patrimonium*, as Gaius calls them in 11. 1. These may be thus classified:

(1) *Res communes*: of which the use belongs to all the world; but the ownership to no one.

(2) *Res publicae*: of which the use is common to the members of a particular state; and the ownership belongs to the state regarded as an unit.

(3) *Res universitatis*: where the

use is or is not common to the members of a corporate body, and does not at any rate belong to persons external to that body; whilst the ownership is in the corporation regarded as an unit.

(4) *Res nullius*: where the ownership is lost to mankind; though the use (for certain specific purposes connected either with religion or the utility of the state) is reserved to individuals.

² 1. 2. 1. But *jus naturale* and

civili. Commodius est itaque a vetustiore iure incipere. palam est autem vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit: civilia enim iura tunc coeperunt esse, cum et civitates condi et magistratus creari et leges scribi coeperunt.

12. Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra, mari, caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt¹: quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia potest a domino, si is providerit, prohiberi ne ingrediatur². Quicquid autem eorum ceperis, eousque tuum esse intellegitur, donec tua custodia coërcetur; cum vero evaserit custodiam tuam et

civil law. It is most convenient then to commence with the more ancient law: and it is clear that the more ancient is the natural law, since the nature of things brought it into existence simultaneously with the human race itself; whilst civil laws began to exist when states were first founded, magistrates appointed and laws written.

12. Wild beasts, therefore, and birds and fishes, that is to say all animals that live on the earth, in the sea or in the air, as soon as they are caught by anyone, become his at once by virtue of the law of nations¹. For whatever has previously belonged to no one is granted by natural reason to the first taker. Nor does it matter whether a man catches the wild beasts or birds on his own ground or on another's: although a person purposing to enter on another's land for the purpose of hunting or fowling may of course be prohibited from entering by the owner², if he perceive him. Whatever then you have caught of this kind, is regarded as yours, so long as it is kept in your custody; but when it has escaped from your custody and

jus gentium are not really the same, as is explained in our note on that §, and implied by Justinian himself in I. 5. pr.

¹ This is the first natural title to ownership, viz. *occupation*, and di-

vides itself into three branches, viz. occupation of wild animals, discussed in §§ 12—16: occupation in war, § 17: occupation of inanimate things, §§ 18, 39.

² D. 47. 10. 13. 7, D. 8. 3. 16.

in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio. (13.) Illud quaesitum est, an si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intellegatur. quibusdam placuit statim tuam esse, et eousque tuam videri donec eam persequeris; quodsi desieris persequi, desinere tuam esse et rursus fieri occupantis. alii non aliter putaverunt tuam esse quam si eam ceperis. sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias. (14.) Apium quoque natura fera est. itaque quae in arbore tua consederint, antequam a te alveo includantur, non magis tuae esse intelleguntur, quam volucres quae in tua arbore nidum fecerint: ideoque si alius eas incluserit, is earum dominus erit. favos quoque si quos eae fecerint, quilibet eximere potest. plane integra re si pro-

reverted to its natural freedom, it ceases to be yours, and again belongs to the first taker. And it is considered to have recovered its natural freedom when it has either escaped out of your sight, or is still in sight, but so situated that its pursuit is difficult. 13. It has been debated whether a wild beast is to be considered yours at once, if wounded in such manner as to be capable of capture; and some have held that it is yours at once, and is to be regarded as yours so long as you are pursuing it; but that if you desist from pursuit, it ceases to be yours, and again belongs to the first taker. Others have thought that it is not yours until you have actually caught it. And we endorse the latter opinion, because many things may happen to prevent you catching it.

14. Bees too are naturally wild. Therefore any bees which settle upon your tree are no more considered yours, until you have hived them, than birds which have made their nest in that tree of yours; if, therefore, anyone else hive them he will be their owner. The honeycombs too which they have made any one may take away. But undoubtedly if you see a person entering upon your land before anything has been removed

Violent entry was of course more strictly forbidden, and force might

be met by force; see Cic. *pro Caecina*, § 8, D. 43. 16. 3. 9.

videris ingredientem in fundum tuum, potes eum iure prohibere ne ingrediatur. examen quod ex alveo tuo evolaverit eousque tuum esse intellegitur, donec in conspectu tuo est nec difficilis eius persecutio est : alioquin occupantis fit. (15.) Pavonum et columbarum fera natura est. nec ad rem pertinet, quod ex consuetudine avolare et revolare solent : nam et apes idem faciunt, quarum constat feram esse naturam ; cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. In his autem animalibus quae ex consuetudine abire et redire solent, talis regula comprobata est, ut eosque tua esse intellegantur, donec animum revertendi habeant¹ : nam si revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint. (16.) Gallinarum et anserum non est fera natura. idque ex eo possumus intellegere, quod aliae sunt gallinae, quas feras vocamus, item alii anseres quos feros appellamus. ideoque si anseres tui

(*integra re*), you may legally forbid him to enter. A swarm which has flown from your hive is considered to be yours, so long as it is in your sight and its pursuit not difficult ; otherwise it belongs to the first taker. 15. Peacocks and pigeons are naturally wild : and it is not material that they get into a habit of flying away and coming back ; for bees do the same, and their nature is admitted to be wild : some people, too, have deer so tamed that they habitually go into the woods and come home again, and yet no one denies that these animals also are naturally wild. Still, with regard to animals of this sort, which go and come regularly, the rule has been adopted, that they are regarded as being yours so long as they have the intent of returning¹ ; for if they cease to have that intent, they also cease to be yours and become the property of the first taker. And they are held to have lost the intent of returning, when they cease from the habit of returning. 16. Fowls and geese are not naturally wild. And this we may learn from the fact that there are other fowls which we call "wild" and other geese to which we apply that description. Hence, if your geese or

¹ Gaius II. 68 ; D. 10. 2. 8. 1.

aut gallinae tuae aliquo casu turbati turbataeve evolaverint, licet conspectum tuum effugerint, quocumque tamen loco sint, tui tuaeve esse intelleguntur; et qui lucrandi animo ea animalia retinuerit, furtum committere intellegitur.

17. Item ea quae ex hostibus capimus iure gentium statim nostra fiunt: adeo quidem, ut¹ et liberi homines in servitutem nostram deducantur, qui tamen si evaserint nostram potestatem et ad suos reversi fuerint, pristinum statum recipiunt. (18.) Item lapilli et gemmae et cetera quae in litore inveniuntur iure naturali statim inventoris fiunt. (19.) Item ea quae ex animalibus dominio tuo subiectis nata sunt eodem iure tibi acquiruntur².

20. Praeterea quod per alluvionem agro tuo flumen adiecit iure gentium tibi acquiritur. est autem alluvio incrementum latens. per alluvionem autem id videtur adiici quod ita paulatim adiicitur, ut intellegere non possis quantum quoquo

fowls be by any accident frightened and fly away, they are still considered yours, in whatever place they may be, even though they have got out of your sight: and anyone detaining these animals with the intent of profit is considered to commit a theft.

17. Those things which we take from the enemy are also ours at once by the law of nations: so much so¹, that even freemen are reduced into slavery to us; though still, if they escape from our power and return to their own people, they recover their former condition. 18. Stones too and gems and other things which are found upon the seashore become at once the property of the finder by natural law. 19. On the same principle the young of the animals subject to your power are also acquired by you².

20. Moreover an addition which the river makes to your land by alluvion is yours by the law of nations: and alluvion is an imperceptible increase; that being considered to be added by alluvion which is added so gradually that you cannot

¹ *Adeo ut*: because it is still more remarkable that there is a change not merely of ownership, but of status.

² The second natural title to ownership is here commenced, viz. *acces-*

sion: which subdivides into *natural* accession, *industrial* accession, and *mixed* accession. Each of these has many subdivisions, which are tabulated in App. (E) to our edition of Gaius.

momento temporis adiciatur. (21.) Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit: palam est eam tuam permanere. plane si longiore tempore fundo vicini haeserit, arboresque quas secum traxerit in eum fundum radices egerint, ex eo tempore videntur vicini fundo acquisitae esse¹.

22. Insula quae in mari nata est, quod raro accidit, occupantis fit: nullius enim esse creditur. At in flumine nata, quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum qui ab utraque parte fluminis prope ripam praedia possident pro modo latitudinis cuiusque

perceive how much is added at each instant of time. 21. But if the violence of the river force away a portion from your field and carry it to the field of your neighbour, it is clear that it remains yours. Although, doubtless, if it remain attached to your neighbour's field for a considerable time, and if the trees which it may have borne along with it have fixed their roots in that field of his, from that period the trees are regarded as accruing to your neighbour's field¹.

22. When an island rises up in the sea, a rare occurrence, it belongs to the first occupant, for (previously) it is regarded as belonging to no one. But when one rises up in a river, a thing often happening,—if it occupy the middle thereof, it is the com-

¹ There has been some doubt as to the proper reading of this passage. But we think the probability is in favour of the reading "videtur acquisitae," rather than "videtur acquisita," from a comparison of the doctrine here enunciated and that expressed in D. 39. 2. 9. 2, and Inst. 2. 1. 31. Those who hold that the wording should be "videtur acquisita" support their view by a reference to the paraphrase of Theophilus, and an appeal to the whole context; which, as they think, shows that the rules here given were applicable to one point only, viz. the effect of the waters upon the land itself, and not upon the accession of the land, to wit the trees standing upon it. Those who care to pursue the point further can consult an article

in *Thémis*, VI. p. 143 &c. Schrader approves of the reading we have adopted; because, he says, the general question of the ownership of the land might admit of dispute, but there could be none as to the transfer of property in the trees after they had taken root; and so in an elementary treatise the compilers would be more likely to confine their attention to matters indisputable, and avoid knotty points.

In the editions of 1560, 1567 by Hotoman the passage is given "videtur acquisita esse;" in the Codex Bambergensis of the 12th century, "videtur acquisitae;" in the Codex Hafniensis of the 13th century, "acquisita est." See Vinnius' notes on the passage: Vinnii, *Inst. Comm.* II. 1. 21, note 1.

fundi, quae latitudo prope ripam sit. quodsi alteri parti proximior sit, eorum est tantum qui ab ea parte prope ripam praedia possident. Quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicuius in formam insulae redegerit, eiusdem permanet is ager cuius et fuerat. (23.) Quodsi naturali alveo in universum derelicto alia parte fluere coeperit, prior quidem alveus eorum est qui prope ripam eius praedia possident, pro modo scilicet latitudinis cuiusque agri, quae latitudo prope ripam sit; novus autem alveus eius iuris esse incipit cuius et ipsum flumen, id est publici. quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit qui prope ripam eius praedia possident. (24.) Alia sane causa est, si cuius totus ager inundatus fuerit. neque enim inundatio speciem fundi commutat; et ob id, si recesserit aqua, palam est eum fundum eius manere cuius et fuit.

25. Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is

mon property of those who possess lands along the bank on either side of the river, in proportion to the breadth of each man's land as measured along the bank. But if it be nearer to one side than the other, it belongs to those only who possess the lands near the bank on that side. If, however, the river be anywhere divided, and then reunite itself below, and so convert any man's land into an island, that land remains the property of the same person to whom it previously belonged. 23. Again, if the river, leaving its natural channel altogether, begin to flow in another direction, the original bed belongs to those who possess the lands along the bank, in proportion, of course, to the breadth of each man's land measured along the bank; and the new bed begins to be of the same character as the river itself, namely public. But if after a while the river return to its former channel, the new bed again belongs immediately to those who have the lands along its bank. 24. The case is entirely different, supposing a man's land be completely flooded, for the flood does not alter the character of the land; and therefore, if the water retire, it is clear that the field remains the property of him to whom it originally belonged.

25. When anyone has converted another person's property into a new form, the question is often asked, which of them is

qui fecerit, an ille potius qui materiae dominus fuerit¹: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. et post multas Sabinianorum et Proculianorum² ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse qui materiae dominus fuerat; si non possit reduci, eum potius intellegi dominum qui fecerit. ut ecce vas conflatum potest ad rudem

the owner thereof on natural principles; whether the man who made the thing, or rather he who was previously the owner of the substance¹: for example when any one has made wine or oil or corn from the grapes or olives or ears of another, or made any vessel of another's gold or silver or copper, or compounded mead of another's wine or honey, or made a plaster or eye-salve of another's drugs, or a garment of another's wool, or a ship or chest or seat out of another's planks. And after many controversies between the Sabinians and Proculians², the middle view has been approved, held by those who think that if the new form can be reconverted into its materials, that man is to be regarded as owner who was originally owner of the materials; but that if it cannot be reconverted, the other who made it is to be regarded as owner: for example a vessel made by

¹ We are now dealing with *specificatio*, a variety of industrial accession.

² The Sabinians were the lawyers of the conservative school, who insisted on a strict and close adherence to the letter of the law: the Proculians were the party of progress, who inclined to a broader interpretation than strict adherence to the letter would have permitted. The schism amongst the Roman lawyers was in reality earlier than the times of Sabinus and Proculus, having commenced in the days of Ateius Capito and Antistius Labeo, who flourished under Augustus. After the death of Capito, Sabinus was the leader of the conservatives, and

in his turn was succeeded by Cassius. Labeo's reforming spirit was transmitted by him to his pupil Nerva. Nerva was followed by Proculus, and Proculus again by Pegasus, in the leadership of the party of change. Hence the one school is called indifferently Sabinian or Cassian, the other Proculian or Pegasian; appellations so frequently occurring in the classical jurists that it seems worth while to state these particulars here. For further information we may refer the reader to D. I. 2. I. 47, Gravina *de Ortui et Progressu Juris Civilis*, § 45; Hugo, *Rechtsgeschichte*, translated into French by Jourdan, Tom. II. §§ 324—329; Gibbon, c. 44.

massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest, ac ne mulsum quidem ad vinum et mel resolvi potest. quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum, aut ex suis et alienis medicamentis emplastrum aut collyrium, aut ex sua et aliena lana vestimentum fecerit, dubitandum non est hoc casu eum esse dominum qui fecerit: cum non solum operam suam dedit, sed et partem eiusdem materiae praestavit. 26. Si tamen alienam purpuram quis intexuit suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimento; et qui dominus fuit purpurae adversus eum qui subripuit habet furti actionem et conductionem¹, sive ipse est qui vestimentum fecit, sive alius. nam extinctae res, licet vindicari

casting can be reconverted into the rough mass of copper or silver or gold; but wine or oil or corn cannot be returned into grapes or olives or ears, neither can mead be resolved into wine and honey. But when a man has created a new form out of materials partly his own and partly another's, for instance when he has compounded mead out of his own wine and another person's honey, or a plaster or eye-salve out of his own drugs and those of other people, or a garment out of wool partly his and partly another's, in such a case there is no doubt that the maker is the owner; since he has not only given his labour, but provided also a portion of the materials of the article. 26. If, however, any one has interwoven with his own garment purple thread which belongs to another person, the purple thread, though the more valuable, accrues to the garment as an accessory; and the former owner of the purple thread has an action of theft and a conduction against the man who stole it, whether the latter or another person be the maker of the garment¹: for although things that have ceased to exist

¹ The *actio furti* is an action for a penalty: the *condictio furtiva* an action brought against the thief to recover the value of the stolen article. The sufferer could bring *both* actions: and in lieu of the *condictio* he could, if he thought fit, and if the stolen thing still existed, bring a *vindicatio*, or real action, to recover the identical thing lost, and not its

mere value. The penalty in the *actio furti* was twofold or fourfold according to circumstances. This explanation must suffice for the present, as the whole subject will be found treated at length when the reader arrives at IV. 1. It is plain from the occurrence of the phrase "extinctae res" in the next sentence, that Justinian is speaking of

non possint, condici tamen a furibus et a quibusdam¹ aliis possessoribus possunt. (27.) Si duorum materiae ex voluntate dominorum confusae sint, totum id corpus quod ex confusione fit utriusque commune est, veluti si qui vina sua confuderint aut massas argenti vel auri conflaverint. sed et si diversae materiae sint, et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento electrum, idem iuris est: nam et eo casu communem esse speciem non dubitatur². quodsi fortuitu, et non voluntate dominorum, confusae fuerint, vel diversae materiae vel quae eiusdem generis sunt, idem iuris esse placuit. (28.) Quodsi frumentum Titii tuo frumento mixtum fuerit, si quidem ex voluntate vestra, commune erit,

cannot be recovered by vindication, yet a condictio lies for them against thieves and certain other possessors¹. 27. If materials belonging to two persons be mixed together with the owners' consent, the whole substance formed by the mixture is the common property of the two; for instance, if they pour together their wine, or fuse together their ingots of silver or gold. And even if the materials be unlike, and so a substance different from either be formed, mead, for example, from wine and honey, or electrum from gold and silver, the rule is the same; for in this case too there is no doubt that the substance newly formed is common property². Also, if the substances be mixed together by accident and not with the consent of the owners, whether they be different or alike, the same rule holds. 28. Again, if the corn of Titius become mixed with yours, and if this be done with the consent of both of you, the corn will be common property: because the indi-

a case where the purple is so interwoven as to be inseparable: if, on the other hand, it could be separated, the original owner would commence with an *actio ad exhibendum* for the production of the purple, and having thus secured himself against its being made away with, would institute a *vindicatio* for the very article itself, if he preferred actual recovery to a money compensation. See D. 10. 4. 7. 2.

¹ Another reading is "quibuslibet," i.e. "against any possessors." But good faith was a valid defence to a *condictio furtiva*, and the proper

method of proceeding against an innocent appropriator was by *actio ad exhibendum* (see Schrader's note on the passage), so that this reading can scarcely be accepted. There is much doubt as to the possessors intended: possibly those who took by violence what was really their own are indicated, for thieves and possessors by violence are often classed together in Roman Law.

² Justinian is now treating of another title, viz. *confusio* of liquids, closely akin to which is the *com-mixtio* of solids referred to in the next paragraph.

quia singula corpora, id est singula grana quae cuiusque propria fuerint ex consensu vestro communicata sunt. quodsi casu id mixtum fuerit, vel Titius id miscuerit sine voluntate tua, non videtur commune esse, quia singula corpora in sua substantia durant, nec magis istis casibus commune fit frumentum, quam grex communis esse intellegitur, si pecora Titii tuis pecoribus mixta fuerint; sed si ab alterutro vestrum id totum frumentum retineatur, in rem quidem actio¹ pro modo frumenti cuiusque competit, arbitrio autem iudicis continetur, ut is aestimet quale cuiusque frumentum fuerit.

29. Cum in suo solo aliquis ex aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. nec tamen ideo is qui materiae dominus fuerat desinit eius dominus esse; sed tantisper neque vindicare eam potest neque ad exhibendum² de ea re agere, propter legem

vidual particles, i.e. the single grains, which were the property of each, have become common property by your agreement. But if such mixture took place by accident, or if Titius made it without your consent, the corn is not considered common property; because the individual particles retain their substance; and in such case the corn no more becomes common property than a herd would be, supposing the cattle of Titius became mixed with your cattle. Hence if the whole of the corn be detained by one of you, an *actio in rem*¹ can be brought by the other in respect of his proportion of the corn; although it is within the competence of the *judex* to estimate the quality of the corn originally belonging to each.

29. When a man builds upon his own ground with another person's materials, he is considered to be owner of the building; because all superstructures are accessories to the soil. But the former owner of the materials does not by this rule cease to be owner; only for a while he cannot either bring a real action for them, or take proceedings for their production², because of the law

¹ An *actio in rem* is the same as a *vindicatio*, viz. an action for specific recovery. In theory the grains can be separated and so a *vindicatio* will lie: in practice they cannot, so the action is of the class styled *arbitraria* (see IV. 6. 31), i.e. the *judex* has power to adjudge that the de-

fendant shall restore the thing or pay a sum of money, measuring the pecuniary equivalent with reference to quality; and as specific restitution is impossible, the judgment is tantamount to an absolute award of damages.

² The *actio ad exhibendum*, as we

duodecim tabularum¹ qua cavetur, ne quis tignum alienum aedibus suis iniunctum eximere cogatur, sed duplum pro eo praestet per actionem quae vocatur de tigno iniuncto (appellatione autem tigni omnis materia significatur ex qua aedificia fiunt): quod ideo provisum est ne aedificia rescindi necesse sit. sed si aliqua ex causa dirutum sit aedificium, poterit materiae dominus, si non fuerit duplum iam persecutus, tunc eam vindicare et ad exhibendum de ea re agere. (30.) Ex diverso, si quis in alieno solo sua materia domum aedificaverit, illius fit domus cuius et solum est. sed hoc casu materiae dominus proprietatem eius amittit, quia voluntate eius alienata intelligitur, utique si non ignorabat in alieno solo se aedificare: et ideo, licet diruta sit domus, vindicare materiam non possit. certe illud constat, si in possessione constituto aedificatore soli dominus petat domum suam esse, nec solvat pretium materiae

of the Twelve Tables¹, in which it is provided that no one can be constrained to take out another man's *tignum* which has been worked into his own building, but has to pay him the double value by means of the action styled "de tigno iniuncto." Under the appellation of *tignum* is comprehended every kind of material whereof buildings are made. The object of this rule is to prevent the necessity of buildings being taken down: but if for any reason the building be destroyed, the owner of the materials, if he have not already recovered the double value, can then proceed by real action, and sue for production. 30. If, in the contrary case, any one build a house on another's ground with his own materials, the house belongs to the owner of the soil. And in this case the owner of the materials loses his ownership, because they are regarded as alienated by his consent, at any rate if he were not unaware that he was building on the ground of another; and therefore, even if the house be destroyed, he cannot bring a real action for the materials. It is fully admitted, however, that if the builder be established in possession, and the owner of the ground claim the house as his own, and will not pay the price of the materials and the wages of the workmen, he can be met

have already said (see note on p. 89), was preliminary to a *vindicatio*. The plaintiff demanded production in order that the thing produced

might follow the sentence in the subsequent *vindicatio*.

¹ Tab. vi. 7 and 8. D. 10. 4. 6, D. 46. 3. 98. 8.

et mercedes fabrorum, posse eum per exceptionem doli mali¹ repelli; utique si bonae fidei possessor fuit qui aedificasset: nam scienti alienum esse solum potest culpa obici, quod temere aedificavit in eo solo quod intellexeret alienum esse.

31. Si Titius alienam plantam in suo solo posuerit, ipsius erit; et ex diverso, si Titius suam plantam in Maevii solo posuerit, Maevii planta erit, si modo utroque casu radices egerit. antequam autem radices egerit, eius permanet cuius et fuerat². adeo autem, ex quo radices egerit planta, proprietates eius commutatur, ut si vicini arbor ita terram Titii presserit, ut in eius fundum radices ageret, Titii effici arborem dicimus: rationem etenim non permittere, ut alterius arbor esse intelligatur quam cuius in fundum radices egisset. et ideo prope confinium arbor posita, si etiam in vicini fundum radices egerit, communis fit. 32. Qua ratione autem plantae quae terra coallescunt solo cedunt, eadem ratione frumenta quoque quae sata

by the plea of fraud¹, supposing the builder be a possessor in good faith: for if he was aware that the soil was another man's, he can be charged with wrong for building recklessly on soil which he knew to belong to some one else.

31. If Titius set another man's plant in his own ground, the plant will be his; and conversely, if Titius set his own plant in Maevius' ground, the plant will be Maevius': provided only in each of the cases that it has taken root: for before it has taken root it belongs to its former owner². But from the time of its striking root its ownership is so completely changed, that even if a neighbour's tree encroach on the ground of Titius in such manner as to strike root there, we should maintain that the tree belongs to Titius; for reason will not allow that a tree should be considered any other person's than the man's in whose ground it has fixed its roots. And therefore a tree planted near a boundary, if it stretch out its roots into the neighbour's ground also, becomes common property. 32. On the same principle

¹ This is a good example of the meaning of the *exceptio doli mali*, as asserting a want of equity on the plaintiff's part, which, although not actual fraud, will, if proved, be as fatal to his claim as fraud wilfully committed.

² This is an instance of *mixed* accession, i.e. of accession partly industrial, partly natural: and we see from the doctrine laid down in the text that the natural element was the more important of the two.

sunt solo cedere intelleguntur. Ceterum sicut is qui in alieno solo aedificaverit, si ab eo dominus petat aedificium, defendi potest per exceptionem doli mali, secundum ea quae diximus: ita eiusdem exceptionis auxilio tutus esse potest is qui in alienum fundum sua impensa bona fide conseruit¹.

33. Literae quoque, licet aureae sint, perinde chartis membranisque cedunt, ac si solo cedere solent ea quae inaedificantur aut inseruntur: ideoque si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, huius corporis non Titius, sed tu dominus esse iudicaris. sed si a Titio petas tuos libros tuasve membranas esse, nec impensam scripturae solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumve possessionem nactus est. (34.) Si quis in aliena tabula pinx-

whereby plants growing on the land belong to the soil, does corn also when sown become accessory to the ground. But just as the builder on another's ground can, as we have said, defend himself by the plea of fraud, if the owner claim the building from him; so can a man defend himself by the aid of the same plea, when he has in good faith sown at his own expense in another person's field¹.

33. Writing too, even if of gold, is as much an accessory to the paper or parchment, as buildings or crops are an accessory to the soil: and therefore, if Titius have written on your paper a poem, a history or an oration, you, and not Titius, are regarded as the owner of the substance. But if you claim from Titius your books or parchments, and do not offer to pay the expense of the writing, Titius can defend himself by plea of fraud, at any rate if he obtained possession of the paper or parchment in good faith. 34. If any man have painted upon another's tablet, some think

¹ But this rule only holds when the sower is without fraud in possession of the other person's field: if out of possession, it is certain that the builder will lose his materials and the sower his seed, if they knew the land was another's: and it is by no means settled that the same result will not follow if the building or sowing took place in perfect good faith on land which they did not

possess. See D. 41. 1. 7. 12, D. 5. 3. 38, D. 44. 4. 14, D. 12. 6. 33.

It would almost seem as if the doctrine of "emblems" in the English law rested on the same principle of the inequity of allowing one to reap what another has sown, the latter being at the time in lawful possession. See Co. Litt., Hargrave's edition, Vol. 1. 55 (a).

erit, quidam putant tabulam picturae cedere; aliis videtur pictura qualiscumque sit tabulae cedere. sed nobis videtur melius esse tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere. unde si a domino tabulae imaginem possidente is qui pinxit eam petat, nec solvat pretium tabulae, poterit per exceptionem doli mali summoverti; at si is qui pinxit possideat, consequens est, ut utilis actio¹ domino tabulae adversus eum detur; quo casu, si non solvat impensam picturae, poterit per exceptionem doli mali repelli, utique si bona fide possessor fuerit ille qui picturam imposuit. illud enim palam est, quod

that the tablet is an accessory to the picture: whilst others hold that the picture, however valuable it may be, is an accessory to the tablet. But to us it seems better that the tablet should be an accessory to the picture; for it is absurd that a picture by Apelles or Parrhasius should go as an accessory to a paltry tablet. Hence, if the owner of the tablet be in possession of the picture, and the painter claim it from him, but refuse to pay the price of the tablet, he can be met by the plea of fraud. But if the painter be in possession, it follows that the owner of the tablet will be allowed an *utilis actio*¹ against him: although in such case, unless he pay the expense of the painting, he can be met by the plea of fraud, at any rate if the painter took possession in good faith. For it is clear that if the

¹ In assigning new actions the Praetor was careful to frame them, as far as possible, on the precedent of actions already existing under the civil or praetorian law. It might be that the precise phraseology of some enactment was not applicable to the case in question, although its principle could be turned to use; the Praetor therefore, although unable to grant an *actio directa*, could and did grant an *actio utilis*, i.e. an "analogous" action: —the epithet *utilis* being derived not from *uti* the verb, but *uti* the adverb.

The special circumstances of the present case are: (1) that it is a

general rule that a *vindicatio* can only be brought by the *dominus*, the owner of the thing, when he is kept out of possession: (2) that *ipso iure* there is no separate property in an accession, so that one who claims the accession *not* through the principal thing is not a *dominus*, and hence has no action: therefore the *dominus* being in possession of the picture, the owner of the tablet has by the civil law no action for his tablet. Here then is an opportunity for the Praetor to meet the spirit, and contravene the letter of the law, by granting to the latter person an *actio utilis*. See Austin, II. 303. (II. 621, third edition.)

sive is qui pinxit subripuit tabulas, sive alius, competit domino tabularum furti actio.

35. Si quis a non domino quem dominum esse credebatur bona fide fundum emerit, vel ex donatione aliave qua iusta causa aequae bona fide acceperit; naturali ratione placuit fructus quos percepit eius esse pro cultura et cura. et ideo si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest. Ei vero qui sciens alienum fundum possederit non idem concessum est. itaque cum fundo etiam fructus, licet consumpti sunt, cogitur restituere. (36.) Is ad quem usufructus¹ fundi pertinet non aliter fructuum dominus efficietur, quam si eos ipse percepit. et ideo, licet maturis fructibus nondum tamen perceptis decesserit, ad heredem eius non pertinent, sed domino proprietatis acquiruntur². eadem

painter or any one else stole the tablet, the owner thereof has an action of theft.

35. If any person have in good faith bought a field from one who is not the owner, but whom he thought to be the owner, or have received it as a gift from him or by any other legitimate transaction, provided as before it be in good faith, it is a rule accordant with natural reason that such fruits as he has gathered shall be his in return for his cultivation and care; and therefore if the owner subsequently come upon him and claim the field, he cannot proceed for the fruits that have been consumed by him. But the same allowance is not accorded to a man who has knowingly held possession of a field belonging to another person; and therefore, together with the field, he is compelled to make good the fruits, even though they have been consumed. 36. The person entitled to the usufruct¹ of land does not become owner of the fruits unless he has actually gathered them; and so if he should die when the fruits, though ripe, are not yet gathered, these fruits do not belong to his heir, but are the property of the owner of the soil². And the same, in the

¹ See II. 4.

² The usufructuary or tenant receives from the owner of the land, 1st a mere right of detention of the land itself and not civil possession: by which "civil possession" is meant a possession protected by interdicts (IV. 15) and able to ripen into owner-

ship through usucapion (II. 6): 2nd an implied permission to take civil possession of the fruits as they arise. Does then this civil possession of the fruits require to be held for a specific time and so by usucapion turn into ownership? No; for when possession is tendered and accepted

fere et de colono¹ dicuntur. (37.) In pecudum fructu etiam fetus est, sicuti lac et pilus et lana: itaque agni et haedi et

main, are the rules affecting a *colonus*¹. 37. The offspring of cattle is a part of their fruits, just as their milk, hair, and wool

with the intent of transferring ownership, this is a perfect conveyance, as we see from § 40 below. Hence the usufructuary or tenant can become owner by mere acceptance, the tender and the intent of transfer being preexistent; and the *perceptio*, or reduction of the fruits into possession, is the act denoting his acceptance. If he fail to do an act entirely in his own power, he deservedly loses the fruits.

The *bonae fidei* possessor has more than detention of the land; he has civil possession. Until the error of his possession is discovered, he is a *quasi-dominus*, and therefore, in like manner as a *dominus*, he has the same rights in the accessory, i. e. the fruits, as in the principal, i. e. the land: that is to say he has civil possession of the former without severance or *perceptio*, for both his rights originate from the law and not from grant. In strictness, of course, neither land nor fruits are his irrevocably unless the mistake remains undiscovered till the time of usucapion is passed: but in consideration of his cultivation and care he is allowed not only to retain those fruits which he has fairly acquired by usucapion, but those fruits also which he has *bonâ fide* consumed, even though three years have not elapsed since the consumption. See Savigny, *On Possession*, translated by Perry, pp. 200, 201.

¹ The *coloni* were of two classes, one termed *servi censiti*, *adscriptitii* or *tributarii*, the other *ingulimi*, *coloni liberi* or *coloni* simply. Both came into existence about the time of Constantine and were serfs tied to the land, rather than slaves. The first class were in all probability originally slaves, but the difficulty

of obtaining cultivators of the soil induced landowners to grant them personal liberty on condition that they remained upon their estates; the other class were originally freemen who had bound themselves to reside and cultivate the land of their powerful neighbours to secure subsistence. Both, therefore, were alike in being unable to remove at their own pleasure, but whereas the *adscripti* could only have a *peculium* at the best (see II. 9.), the *coloni* proper were not prevented from owning moveables, or perhaps even land in addition to that which they were bound to till for their lords. Both, however, had the privilege of retaining for themselves, whether as *peculium* or *property*, the profits they made over and above their *canon* or rent. See the whole subject fully discussed in C. 11. 47.

The free *coloni* had, then, a right to take the fruits of their land in consideration of an annual render; and their heirs had also a right to retain the fruits gathered by the ancestor: whereas the heirs of the usufructuary had no such right. Again if the proprietor sold the land, the purchaser took subject to the rights of the usufructuary, but the new owner could oust a *colonus*, whose only remedy was by personal action against the former owner. These two differences justify the insertion in the text of the word *fere*. *Coloni*, in fact, would seem to have been unable to depart from the soil, if the new owner wished to retain them; and unable to remain upon it, if the new owner wished to dispossess them. Silence on his part was, however, equivalent to consent to their continuance in their holdings.

vituli et equuli statim naturali iure domini sunt fructuarii. Partus vero ancillae in fructu non est: itaque ad dominum proprietatis pertinet. absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit¹. (38.) Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex fetu fructuarius summittere debet (ut et Iuliano visum est), et in vinearum demortuarum vel arborum locum alias debet substituere. recte enim colere debet et quasi bonus paterfamilias².

39. Thesaurus quos quis in suo loco invenerit divus Hadrianus, naturalem aequitatem secutus, ei concessit qui invenerit: idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit³. At si quis in alieno loco, non data ad hoc opera, sed fortuito invenerit, dimidium domino soli concessit. et convenienter si quis in Caesaris loco inuenerit, dimidium

are. Therefore lambs, kids, calves, and colts are at once, by the law of nature, part of the property of the usufructuary. But the offspring of a female slave is not a fruit, and therefore belongs to the owner of the property: for it seemed outrageous that a man should be part of the fruit, when the nature of things has provided all fruits for the benefit of mankind¹. 38. When any person has the usufruct of a flock, he must, as Julian maintained, replace from the offspring any of the original stock which die: and he must in the place of dead vines or trees replant others: for he is bound to cultivate fairly and like a good husbandman².

39. The late emperor Hadrian, in accordance with natural equity, granted to the finder any treasure which he discovered on his own ground: and laid down the same rule in case any one found treasure by chance in a sacred or religious place³. But if any one found treasure on another's ground, not by devoting his labour to the search, but accidentally, he granted one half to the owner of the ground: and on the like principle, if any one found anything on the Emperor's ground, he

¹ Cic. *de Fin.* I. 4. 12, Ulpian in D. 7. 1. 68, pr. The concluding words of the paragraph "absurdum enim videbatur.....comparavit," are taken from the work of Gaius entitled *Rerum Quotidianarum sive Aurorum*, and are quoted in D. 22.

I. 28.

² D. 7. 1. 68. 2, D. 7. 1. 69, D. 7. 1. 18.

³ Justinian now reverts to the subject of *occupatio*. See § 12, above. For *locus sacer aut religiosus*, see II. 1. 7—9.

inventoris, dimidium Caesaris esse statuit. cui conveniens est, ut si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis¹.

40. Per traditionem quoque iure naturali res nobis acquiruntur: nihil enim tam conveniens est naturali aequitati, quam voluntatem domini volentis rem suam in alium transferre ratairi haberi. Et ideo, cuiuscumque generis sit corporalis res, tradi potest, et a domino tradita alienatur. itaque stipendiaria quoque et tributaria praedia² eodem modo alienantur. vocantur autem stipendiaria et tributaria praedia quae in provinciis

ordained that half should belong to the finder, and the other half to the Emperor. It is consistent with this rule that when any one finds treasure on land belonging to the treasury or to a city, half is his own, and half is the property of the treasury or the city¹.

40. Things are also acquired by us according to natural law through a delivery: for nothing is more consistent with natural equity than to hold valid the wish of an owner who desires to transfer his property to another. And therefore a corporeal thing, of whatever kind it be, can be delivered, and when delivered by its owner is alienated. Hence stipendiary and tributary lands² are alienated in this way: which titles of "stipendiary" or "tributary" are given to lands situated in the provinces.

¹ The notion seems to be that the owner of the land having a claim by accession and the finder one by occupancy, a compromise should be made and each take half.

² Stipendiary lands are those situated in the senatorial provinces (*populi provinciae*), tributary are those situated in the provinces of the emperor (*Caesaris provinciae*). These lands were never *res Mancipi*, and had not at any time required mancipation for their transfer. The ownership, in fact, resided in the Roman people or in the emperor, and the occupant had possession only, without ownership. His interest therefore could be passed by mere delivery. Italic lands were, on the other hand, *res Mancipi*, for the peculiarities of *solum Italicum* were

(1) that it was exempt from the *vectigal* or land-tax (*tributum* or *stipendium*), levied on the possessors of provincial soil: (2) that the districts where it existed were not governed by officials sent from Rome, but by magistrates chosen by the inhabitants; (3) that the Roman law prevailed there, at any rate in respect of landed property. Therefore, till Justinian made the regulations to which he refers in the text, Italic land needed a *mancipatio* or *cessio in jure* for its transfer: whilst after Justinian's enactments, the *jus Quiritium* being abolished or merged in *possessio in bonis*, all lands became transferable by delivery *ex justa causa*, i. e. for consideration recognised by law.

sunt, inter quae nec non et Italica praedia ex nostra constitutione¹ nulla differentia est. (41.) Sed si quidem ex causa donationis, aut dotis², aut qualibet alia ex causa tradantur, sine dubio transferuntur: venditae vero et traditae non aliter emptori acquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. quod cavetur quidem etiam ex lege duodecim tabularum³, tamen recte dicitur et iure gentium, id est iure naturali, id effici. sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri. (42.) Nihil autem interest, utrum ipse dominus tradat alicui rem, an voluntate eius alius⁴. (43.) qua ratione si cui libera universorum negotiorum

But between these and Italic lands there is now no difference, in consequence of a constitution of ours¹. 41. So that if anything be delivered by way of gift, or marriage settlement², or for any other reason, it is undoubtedly transferred: but still things sold and delivered are not acquired by the purchaser, unless he has paid the price to the vendor or has assured him in some other way, for instance, by furnishing a surety or a pledge. This provision was made even in a law of the Twelve Tables³, and may indeed be fairly said to originate from the law of nations, that is to say, from the natural law. But if the vendor have given credit to the purchaser, we must rule that the article belongs to the latter at once. 42. It makes no matter whether the owner himself deliver the thing to the other party or some one else do so by his desire⁴. 43. Wherefore,

¹ C. 7. 25; whereby the *jus Quiritium*, as distinguished from ownership in *bonis*, was abolished, and all *dominium* put on one footing. As *res mancipi* were thus merged in *res nec mancipi*, slaves, cattle and Italic lands, hitherto capable of transfer only by *mancipatio* or *cessio in jure*, became subjects of *traditio*. See also on the same topic, C. 7. 31.

² As to *dos* and the laws regarding it, see Ulpian's *Rules*, vi. and App. B.

³ Tab. vii. l. 11.

⁴ Ownership was passed by tradition, when the original proprietor, or an agent duly authorized by him,

delivered possession of the article with an intention of parting with the ownership in favour either of the recipient, or of the person for whom he was acting as agent; and when the recipient in his turn accepted possession with the intent of becoming proprietor himself or making his principal the proprietor. Hence, the intentions of both parties being supposed accordant with this definition, all that was requisite was that the transfer of possession should be made conformably to the rules of the Roman Law. These rules are concisely stated by Savigny (*Treatise on Possession*) as follows: 1st there



administratio a domino permissa fuerit, isque ex his negotiis rem vendiderit et tradiderit, facit eam accipientis. (44.) Interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam, veluti si rem quam tibi aliquis commodavit aut locavit aut apud te deposuit, vendiderit tibi aut donaverit.

when the absolute management of the whole of a property is deputed by its owner to another person, who sells or delivers a portion of the goods, he makes the recipient owner thereof. 44. Sometimes even the mere wish of the owner without any delivery is enough to transfer the property; when, for instance, he sells or gives you an article which he has lent to you or deposited with you; for although he did not deliver it to you

must on the part of the receiver be a physical power of dealing with the thing and of preventing all others doing so; 2nd a knowledge on his part that he has this power; 3rd an intention to use it either as owner of the thing or as agent for the person on whose behalf he is acting. In all the cases suggested in Justinian's text the 2nd and 3rd qualifications may be presumed, and thus the first alone requires special consideration.

The physical power of dealing with land could be secured by simple presence of the transferee or his agent, coupled with renunciation of ownership and possession by the first owner or his deputy: and presence was not construed so strictly as to necessitate actual contact, mere view of the land being sufficient. This, however, was not the rule in Gaius' time: for then the *dominium* of Italic lands could not be passed without the special ceremonies of *mancipatio* or *cessio in iure*; but provincial lands were at all times *res nec Mancipi*, and Justinian had made all lands subject to the rules of provincial soil, as he tells us in C. 7. 31 *sub finem*; so that after his legislation the conditions we have above enumerated were sufficient to validate all transfers of immoveable property.

As to moveables:—presence of the transferee, with or without actual touching, provided there was the same renunciation as before on the part of the prior owner, would pass the possession and with it the ownership: and the rule held good at any period of Roman jurisprudence, except in reference to slaves and cattle; these, as we know, being *res Mancipi* in olden times; but these too were made liable to the rules of transfer of *res nec Mancipi* by Justinian's laws.

In § 44 detention already exists: the prior owner consents to the detainer becoming possessor, and the changed intent of the latter is thus legalized. In the case mentioned in § 45, Savigny shows that the transfer of the keys must take place in sight of the warehouse, because though the retaining of them is enough to keep a person in possession, yet a more visible exhibition of power of dealing with the goods is necessary to a transfer of possession. See Savigny, *On Possession*, p. 159.

In §§ 46—48, Justinian brings out clearly the fact that although possession may be acquired without the intention of the original owner, property cannot: the possession in fact is "vicious" and can be resumed.

quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso quod patitur tuam esse statim acquiritur tibi proprietas, perinde acsi eo nomine tradita fuisset. (45.) Item si quis merces in horreo depositas vendiderit, simulatque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem. (46.) Hoc amplius interdum et in incertam personam collocata voluntas domini transfert rei proprietatem: ut ecce Praetores vel Consules, qui missilia iactant in vulgus, ignorant quid eorum quisque excepturus sit; et tamen, quia volunt quod quisque exceperit eius esse, statim eum dominum efficiunt. (47.) Qua ratione verius esse videtur, ut si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici. pro derelicto autem habetur quod dominus ea mente abiecerit, ut id rerum suarum esse nollet, ideoque statim dominus esse desiit. (48.) Alia causa est earum rerum quae in tempestate maris levandae navis causa eiiciuntur. hae enim dominorum permanent, quia palam est eas non eo animo eiici, quo quis eas habere non vult, sed quo magis cum ipsa navi periculum maris

for that end, still by the very fact of his suffering it to become yours, the ownership is forthwith acquired by you, just as if it had been delivered for that express purpose. 45. Moreover, if any one sell goods deposited in a warehouse, he transfers the ownership of the goods to the purchaser so soon as he has given up to him the keys of the warehouse. 46. Nay more, sometimes the intent of the owner, although directed towards an uncertain person, transfers the ownership of an article: the Praetors and Consuls, for instance, who throw largess to the mob, do not know what each person among them will get, and yet, as they intend that what each gets shall be his own, they make him at once owner thereof. 47. On which principle it seems quite correct that if any one be the first taker of an article treated by its owner as derelict, he is at once owner of it. And an article is treated as derelict when the owner has abandoned it with the feeling that he no longer desires it to be his property, and so has ceased at once to be its owner. 48. The case is different with things which are cast overboard in a storm at sea with intent to lighten the ship: for these remain the property of their owners; since it is plain that they are not thrown overboard by the owner with the feeling that he would rather not have them, but in order that he and the ship may the

effugiat: qua de causa si quis eas fluctibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit. nec longe discedere videntur ab his quae de rheda currente non intelligentibus dominis cadunt.

TIT. II. DE REBUS INCORPORALIBUS.

Quaedam praeterea res corporales sunt, quaedam incorporeales¹. (1.) Corporales hae sunt quae sui natura tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. (2.) Incorporeales autem sunt quae tangi non possunt: qualia sunt ea quae in iure consistunt², sicut hereditas, ususfructus, obligationes quoquo modo contractae. nec ad rem pertinet, quod in hereditate res corpo-

better escape the perils of the sea. Wherefore, if any man carry them away with the intent of profit when they are cast ashore by the waves, or when he has found them in the sea itself, he commits a theft. And such things seem to be pretty much of the same character as those which drop out of a cart in motion without the knowledge of the owners.

TIT. II. ON THINGS INCORPOREAL.

Some things again are corporeal, some incorporeal¹.

1. Corporeal things are those which by their nature are tangible, as a field, a slave, a garment, gold, silver, and, in fact, other things innumerable. 2. Incorporeal things are those which cannot be touched: of which kind are those consisting in a right², such as an inheritance, an usufruct, or obligations contracted in any way. Neither is it material that in an inheritance there are comprised corporeal things: for the

¹ "This distinction, as a legal one, scarcely existed before the time of Cicero: for in olden times all matters of right or property were considered 'things,' and no difference was made between things corporeal and things incorporeal in reference to mancipation, tradition, or usucapion." Schrader. This statement is borne out by what we read in Gaius II. 54.

² We see, therefore, that incor-

poreal things are not, strictly speaking, things at all, but only rights to things. We may also remark that "tangible" signifies in Roman law that which is perceptible by any of the senses, according to the Stoic notion which considers all of them modifications of that of touch. Hence "acts" are corporeal things according to this classification. Austin, Lecture XIII. See Cicero, *Topica*, v.

rales continentur; nam et fructus qui ex fundo percipiuntur corporales sunt, et id quod ex aliqua obligatione nobis debetur plerumque corporale est, veluti fundus, homo, pecunia: nam ipsum ius hereditatis, et ipsum ius utendi fruendi, et ipsum ius obligationis, incorporale est. (3.) eodem numero sunt iura praediorum urbanorum et rusticorum¹, quæ etiam servitutes² vocantur.

TIT. III. DE SERVITUTIBUS.

Rusticorum praediorum iura sunt haec: iter, actus, via, aquaeductus³. Iter est ius eundi ambulandi hominis, non etiam

fruits also which are gathered (by the usufructuary) from land are corporeal, and that which is due to us by virtue of an obligation is generally corporeal, as a field, a slave, or money; whilst the right itself of inheritance, and the right itself of the usufruct, and the right itself of the obligation, are incorporeal. 3. In the same category are rights over estates urban or rustic¹, which are also called servitudes².

TIT. III. ON SERVITUDES.

The rights over rustic estates are these: *iter, actus, via, aquaeductus*³. *Iter* is the right of a man to go or walk, but not

¹ Urban and rustic estates are, respectively, lands with or without buildings on them: the situation of either, whether in town or country, is immaterial. D. 8. 4. 1.

² A servitude is a limitation of the rights of ownership; and takes place when the owner, for the benefit of a third party, either (1) undertakes to abstain from doing something which otherwise he could legally do in respect of his property, or (2) permits the third party to do something which otherwise could be forbidden him in respect of the same property.

For a servitude, except in the one case of *servitus oneris ferendi*, does not require action on the part of the *dominus*, but simple abstention from action on his own part, or sufferance of action on the part of the person entitled to the servitude. D. 8. 1. 15. 1.

Servitudes are personal or prædial according as the benefit is conferred on a man personally, or in his capacity of owner of an adjacent plot of land.

³ *Iter*=a right of personal passage, whether on foot, on horseback or in a litter.

Actus=a right of passage for the carriages and pack-horses of the owner of the servitude, as well as for himself.

Via=a general right of passage, but the breadth of the way-leave restricted to eight feet; except at a turn, where it might be sixteen. See D. 8. 3. 8. Anything might be transported where this right existed, timber might be dragged across, stones rolled along, &c. &c. D. 8. 3. 7. pr., D. 8. 3. 12.

Aqueductus=a right of taking water across another's land in pipes or channels.

iumentum agendi vel vehiculum; actus est ius agendi vel iumentum vel vehiculum. itaque qui iter habet, actum non habet; qui actum habet, et iter habet, eoque uti potest etiam sine iumento. Via est ius eundi et agendi et ambulandi: nam et iter et actum in se via continet. Aquaeductus est ius aquae ducendae per fundum alienum. (1.) Praediorum urbanorum sunt servitutes quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellamus, etsi in villa aedificata sunt. Item praediorum urbanorum servitutes sunt hae: ut vicinus onera vicini sustineat¹; ut in parietem eius liceat vicino tignum immittere; ut stillicidium vel flumen recipiat quis in aedes suas vel in aream vel in cloacam; vel non recipiat²; et ne altius tollat quis aedes suas, ne luminibus vicini officiat. (2.) In rusticorum praediorum servitute quidam computari recte putant aquae haustum, pecoris ad

to drive a beast of burden or a vehicle. *Actus* is the right of driving either a beast of burden or a vehicle: therefore he who has *iter* has not got *actus*, whilst he who has *actus* has *iter* also, and therefore can use his right even without taking an animal with him. *Via* is the right of going and driving and walking: for *via* comprehends both *iter* and *actus*. *Aquaeductus* is the right of conducting water through another man's field. 1. The servitudes of urban estates are those attaching to buildings: which are called servitudes of urban estates, because we give the name of "urban" to all buildings, even though built in a country place. The servitudes of urban estates are these: that a neighbour must bear the weight of his neighbour's house¹; that one neighbour must allow the other to fix a beam into his wall; that he has to receive, or not to receive², dropping water or running water into his house, or court-yard or sewer; that he is not to raise his house higher, lest he should interfere with his neighbour's lights. 2. Some think that amongst servitudes of rustic estates may properly be reckoned

Aquaehaustus = a right of fetching water from another's spring, and of course comprehending *iter*.

Aquaeappulsus = a right of driving cattle to another's spring or pond that they may drink there.

¹ As he must keep his wall in repair to do this, we have here the

one case where a servitude necessitates action on the part of the owner of the *praedium serviens*.

² Sc. allow his neighbour to draw it away from him. But the more usual explanation is that a *jus stillicidii non recipiendi* simply meant the renunciation of a pre-existent *jus*

aquam appulsum, ius pascendi, calcis coquendae, arenae fodindae.

3. Ideo autem hae servitutes praediorum appellantur, quoniam sine praediis constitui non possunt. nemo enim potest servitutem acquirere urbani vel rustici praedii, nisi qui habet praedium; nec quisquam debere, nisi qui habet praedium.

(4.) Si quis velit vicino aliquod ius constituere, pactionibus atque stipulationibus id efficere debet¹. Potest etiam in testamento quis heredem suum damnare ne altius tollat aedes suas, ne luminibus aedium vicini officiat; vel ut patiatur eum tignum in parietem immittere vel stillicidium habere; vel ut patiatur eum per fundum ire, agere, aquamve ex eo ducere.

TIT. IV. DE USUFRUCTU.

Ususfructus est ius alienis rebus utendi fruendi salva rerum

the right of drawing water, of driving cattle to water, of pasturage, of burning lime, and of digging sand.

3. These are called servitudes "of estates," because without estates they cannot exist: for no one can acquire a servitude over an urban or rustic estate, except he be the owner of another estate: nor, again, can any person not possessing an estate owe such a servitude. 4. If a man wish to establish any right in his neighbour's favour, he must do so by means of agreements and stipulations¹. A man may also by his testament bind his heir not to raise his house higher in such wise as to obstruct his neighbour's lights, or to allow his neighbour to fix a beam into his wall, or to receive the water from his roof, or to permit him to go or drive vehicles through his land or to conduct water from it.

TIT. IV. ON USUFRUCT.

Usufruct is the right of using and enjoying the property of

stillicidii recipiendi.

¹ Justinian mentions this because in earlier times praedial servitudes on Italic soil could be created by *cessio in jure*; or by *mancipatio* in certain cases. Gaius II. 17, 29.

But as these processes never applied to servitudes over provincial soil, and as Justinian (C. 7. 25) had

made Italic soil subject to the rules of provincial, it necessarily followed that pacts and stipulations were henceforward the only modes of creating praedial servitudes.

A *pactum* is an agreement enforceable by Praetorian, though not by Civil Law. As to a stipulation, see III. 15.

substantia¹. est enim ius in corpore: quo sublato et ipsum tolli necesse est. (1.) Usufructus a proprietate separationem recipit, idque pluribus modis accidit. ut ecce si quis alicui usumfructum legaverit: nam heres nudam habet proprietatem, legatarius usumfructum; et contra, si fundum legaverit deducto usufructu, legatarius nudam habet proprietatem, heres vero usumfructum; item alii usumfructum, alii deducto eo fundum legare potest. Sine testamento vero si quis velit alii usumfructum constituere, pactionibus et stipulationibus² id efficere debet. Ne tamen in universum inutiles essent proprietates, semper abscedente usufructu, placuit certis modis extinguere usumfructum et ad proprietatem reverti. (2.) Constituitur autem usufructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus, exceptis his quae ipso usu consumuntur. Nam haec res neque naturali ratione neque civili³ recipiunt usumfructum.

other people, without detriment to the substance of the property¹. For it is a right over the actual matter; and if that be destroyed, it is a necessity that the right also should vanish. 1. Usufruct is able to be detached from ownership, and this occurs in many ways. It is the case, for instance, when any one leaves the usufruct as a legacy to another person: for then the heir has the bare ownership, and the legatee the usufruct: and, vice versâ, if he leave the land as a legacy with the usufruct deducted, the legatee has the bare ownership, and the heir the usufruct: and thirdly, he may leave the usufruct to one person, and the field with the usufruct deducted to another person. But when any one wishes to create an usufruct otherwise than by testament, he must effect this by agreements and stipulations². Lest, however, ownerships should be rendered entirely valueless through the usufruct being deducted for ever, it has been enacted that the usufruct may in certain ways be extinguished and merged again into the ownership. 2. Now an usufruct may be established not only over land and buildings, but also over slaves and beasts of burden and all other things, except those which are consumed in the using. For the latter do not admit of usufruct either on natural principles or the principles of the civil law³. Of such kind are wine, oil, corn,

¹ Ulp. xxiv. 26.

² II. 3. 4.

³ The natural law opposes this on the ground that use and consump-

quo numero sunt vinum, oleum, frumentum, vestimenta. quibus proxima est pecunia numerata: namque in ipso usu assidua permutatione quodammodo extinguitur. Sed utilitatis causa senatus censuit¹ posse etiam earum rerum usumfructum constitui, ut tamen eo nomine heredi utiliter caveatur. itaque si pecuniae ususfructus legatus sit, ita datur legatario ut eius fiat, et legatarius satisfaciat heredi de tanta pecunia restituenda, si morietur aut capite minuetur². ceterae quoque res ita traduntur legatario, ut eius fiant: sed aestimatis his satisfacitur, ut si morietur aut capite minuetur, tanta pecunia restituatur quanti hae fuerint aestimatae. Ergo senatus non fecit quidem earum rerum usumfructum, nec enim poterat: sed per cautionem quasi usumfructum constituit. (3.) Finitur autem ususfructus morte fructuarii et duabus capitis deminutionibus, maxima et media³, et

garments: and near akin to them is coin: for it is to some extent worn away in its very use by perpetual interchange. But on grounds of public expediency the senate ordained¹ that an usufruct could be created even over these things, provided only sufficient sureties on behalf of them were given to the heir. Therefore, supposing the usufruct of money be bestowed as a legacy, it is given to the legatee in such wise that it becomes his own, and the legatee gives sureties to the heir for returning the same amount of money in case he shall die or suffer a *capitis deminutio*². The other things above named are also delivered to the legatee in such wise as to become his; but sureties are given for their estimated value, so that if the legatee die or suffer a *capitis deminutio*, that amount of money is repaid at which they were valued. The senate, therefore, has not created an usufruct in such things, for that it could not do: but, by means of the security, it has created a quasi-usufruct. 3. An usufruct is terminated by the death of the usufructuary: or by the two forms of *capitis deminutio* called *maxima* and *media*³;

tion are opposites: the civil law because consumption is an attribute of ownership, and there is a civil law maxim that an owner cannot have a servitude over his own property: "nemini sua res servit."

¹ Ulp. xxiv. 27.

² I. 16.

³ I. 16. In ancient times even *capitis deminutio minima* had the same effect; but as this rule was based entirely upon technicality, and opposed to common sense, Justinian abolished it in C. 3. 33. 16. 2.

non utendo per modum et tempus. quae omnia nostra statuit constitutio¹. Item finitur ususfructus, si domino proprietatis ab usufructuario cedatur² (nam extraneo cedendo nihil agit); vel ex contrario si fructuarius proprietatem rei adquisierit, quae res consolidatio appellatur. Eo amplius constat, si aedes incendio consumptae fuerint vel etiam terrae motu, aut vitio suo corruerint, extingui usumfructum, et ne areae quidem usumfructum deberi. (4.) Cum autem finitus fuerit ususfructus, revertitur scilicet ad proprietatem, et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem.

TIT. V. DE USU ET HABITATIONE.

Iisdem istis modis quibus ususfructus constituitur, etiam nudus usus constitui solet; iisdemque illis modis finitur, quibus et ususfructus desinit. (1.) Minus autem scilicet iuris in usu est quam in usufructu³. Namque is qui fundi nudum usum

or by not using in accordance with the mode or time specified; and all these points a constitution of our own has settled¹. An usufruct is also terminated, if released by the usufructuary to the owner of the property² (for by a cession to a third party nothing is effected); or conversely, if the usufructuary acquire the ownership of the thing: which circumstance is called a *consolidation*. And besides this, it is well-established that if a house be consumed by fire or by an earthquake, or fall through its own decay, the usufruct is extinguished, and not even is an usufruct of the ground due. 4. When, therefore, the usufruct is ended, it of course relapses into the ownership, and from that time the owner of the bare property begins to have complete power over the thing.

TIT. V. ON USE AND HABITATION.

A bare use is created in the self-same ways as an usufruct: and is also brought to an end in the self-same ways as an usufruct. 1. But of course fewer rights are comprehended in an use than in an usufruct³. For he who has the bare use of a field

¹ C. 3. 33. 16.

² Gaius II. 30.

³ *Usus* is, strictly speaking, mere use without right to any fruits whatever, whether natural or civil; and

by *civil* fruits lawyers denote those which are the creation of civilization and law, viz. purchase-money, rent, &c.

habet nihil ulterius habere intellegitur, quam ut oleribus, pomis, floribus, foeno, stramentis, lignis ad usum cottidianum utatur¹; in eoque fundo hactenus ei morari² licet, ut neque domino fundi molestus sit, neque his per quos opera rustica fiunt impedimento sit; nec ulli alii ius quod habet aut vendere aut locare aut gratis concedere potest, cum is qui usumfructum habet potest haec omnia facere. (2.) Item is qui aedium usum habet hactenus iuris habere intellegitur, ut ipse tantum habitet, nec hoc ius ad alium transferre potest³, et vix receptum esse videtur ut hospitem ei recipere liceat⁴. et cum uxore sua liberisque suis, item is not considered entitled to any thing more than to use the herbs, fruit, flowers, hay, straw and wood for his daily needs¹; and he may visit² the field only in such wise as not to incommode the owner of it or hinder those engaged in the cultivation. Neither can he sell or let or give gratuitously to any other person the right which he has, although the possessor of an usufruct can do all these things. 2. Again, the man who has the use of a house is regarded as having only such amount of right that he may live there himself, and not that he may transfer this right to another³; and it seems to have been admitted with hesitation that he could entertain a guest⁴. But he has the right of dwelling there together with his wife

¹ See the quotation from Ulpian, in D. 7. 8. 12. 1; where such produce of land as is named in the text is said to belong to the usuary, so far as required *ad usum quotidianum*; but Nerva's opinion is cited "*neque foliis, neque oleo, neque frumento, neque frugibus usurum*." and even as to fruits which may be consumed there is the restriction that they are to be taken for personal use only, and not for profit or for waste; "*non usque ad compendium, sed ad usum scilicet, non usque ad abusum*." Hence only the natural fruits of lesser importance are granted by Nerva, and no civil fruits at all. The Cassians, however, as the same passage itself states, extended the right to moderate consumption of *any* natural fruits, and Ulpian inclines to their view.

² *Morari* here means something more than simple visiting: it evi-

dently implies staying on the land for some time, even to the extent of *habitatio* or *ad fructus percipiendos*; see D. 7. 8. 10. 4, D. 7. 8. 12 pr. The words in the text are taken from D. 7. 8. 11. All these texts must be read together in order to see the extent, as well as the limitation, of the privileges of the *usuarius*.

³ The usuary of a house may not have the whole of his use converted into "civil fruits;" though he may have a part so converted, by taking in relations, slaves or servants to live with him. See D. 10. 3. 10. 1: "Qui mercedem accepit... videtur frui." See also as to the doubts once felt on these points, D. 7. 8. 2. 1.

⁴ It was admitted with hesitation by the very oldest authorities only; and their hesitation was entirely disregarded in later times, as we may see from D. 7. 8. 2. 1: D. 7. 8. 4. pr.

libertis, nec non aliis liberis personis quibus non minus quam servis utitur, habitandi ius habeat, et convenienter si ad mulierem usus aedium pertineat, cum marito ei habitare liceat¹.

(3.) Item is ad quem servi usus pertinet ipse tantum operis atque ministerio eius uti potest; ad alium vero nullo modo ius suum transferre ei concessum est. Idem scilicet iuris est et in iumento. (4.) Sed si pecoris vel ovium usus legatus fuerit, neque lacte neque agnis neque lana utetur usuarius; quia ea in fructu sunt. plane ad stercorandum agrum suum pecoribus uti potest².

5. Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque usufructus, sed quasi proprium aliquod ius. quam habitationem habentibus propter rerum utilitatem, secundum Marcelli sententiam, nostra decisione promulgata permisimus non solum in ea degere, sed etiam aliis locare³.

and his children, with his freedmen also, and with other free persons as well, if he employ them as regularly as he does his slaves. And on the same principle, if the use of a house belong to a woman, she may dwell there together with her husband¹. 3. Again, he to whom the use of a slave belongs may only himself employ the labour and services of the slave: but may not on any account transfer his right to another. And of course the rule is the same as to a beast of burden. 4. Also if the use of cattle or sheep be given as a legacy, the usuary may not make use either of the milk, or the lambs, or the wool; because these are part of the fruits. But he may undoubtedly employ the flock to manure his land².

5. But if the right of habitation be bestowed either by way of legacy or in any other manner upon a person, this is considered to be neither an use nor an usufruct, but a sort of special right. So, in accordance with an opinion of Marcellus, and with a view to convenience, we have published a decision permitting those who have this right of habitation, not only to dwell in the place themselves, but to let it out to others³.

¹ This had been disputed, but Q. Mucius settled the question in the affirmative. D. 7. 8. 4. 1.

² On the principle referred to in note (1) on the preceding page, that

only the minor fruits go with the use.

³ C. 3. 33. 13. Thus allowing the civil fruits to go with *habitatio*, though not with simple *usus*.

6. Haec de servitutibus et usufructu et usu et habitatione dixisse sufficiat. de hereditate autem et de obligationibus suis locis proponemus.—Exposuimus summam quibus modis iure gentium res acquiruntur: modo videamus quibus modis legitimo et civili iure acquiruntur¹.

TIT. VI. DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS.

Iure civili constitutum fuerat, ut qui bona fide ab eo qui dominus non erat, cum crediderit eum dominum esse², rem emerit vel ex donatione aliave qua iusta causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo³ usucapiat, ne rerum dominia in incerto essent⁴.

6. Let it suffice to have said so much on servitudes, usufruct, use and habitation: as to inheritance and obligations we will speak in their proper places. We have explained briefly by what methods things are acquired by us according to the law of nations: now let us consider by what methods they are acquired according to statute and civil law¹.

TIT. VI. ON USUCAPIONS AND POSSESSIONS FOR LONG TIME.

By the civil law it was laid down that if a person in good faith bought a thing, or received it by gift or other lawful process, from a person who was not the owner, but whom he thought to be the owner², he should by use acquire the said thing, being a moveable, in one year, wherever it were situated; but being an immoveable, in two years, provided only it were on Italic soil³; in order that the ownership of property might not be in uncertainty⁴. And since this had been sanctioned in

¹ No distinction is intended between *jus legitimum* and *jus civile*: these are but two names for the same thing.

² This was not the only case in which usucapion could take place: another most important instance was when a *res mancipi* was simply delivered, Gaius II. 41.

³ Italic soil was not necessarily

in Italy. The name signified that portion of the Roman empire in which certain privileges and immunities were granted to the inhabitants. See note on II. I. 40. A list of colonies possessing the *Jus Italicum* is given in D. 50. 15. 1. 6, 7 and 8.

⁴ Gaius II. 42—44.

Et cum hoc placitum erat, putantibus antiquioribus dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur. et ideo constitutionem¹ super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem (id est inter praesentes² decennio, inter absentes viginti annis) usucapiantur³, et his modis non

consequence of the old authorities holding that the periods above-named were sufficient for owners to make inquiry after their property, a wiser provision suggested itself to us, in order to prevent owners being deprived of their goods too soon, and also that the protection might not be confined to any particular place. Therefore we have published a constitution¹ on this subject, by which it has been enacted, that moveables shall be acquired by use during three years, but immoveables by possession for long time (*i.e.* for ten years, if the parties be present, and for twenty, if they be absent²), and that by these methods the ownership³ of property shall be acquired not only in Italy,

¹ C. 7. 31.

² There is some dispute as to the meaning of *praesentes* and *absentes*, but probably persons are *praesentes* when domiciled in the same province, *absentes* when in different provinces.

³ Justinian first made prescription equivalent to usucapion as a means of establishing ownership. Before that emperor's legislation, there were three points of difference between the two, viz.

(1) Usucapion created Quiritary ownership, prescription only gave *possessio in bonis* or Bonitary ownership.

(2) Usucapion therefore established a right of action, i. e. the power of bringing a *vindicatio*, if the possessor became dispossessed by any means: but prescription only furnished the possessor with a valid plea or exception as against the plaintiff in a suit for recovery; and not con-

ferring ownership, did not enable the possessor, who had prescribed, to sue a new possessor, whose possession was gained without fraud or violence.

(3) Usucapion applied only to moveables and Italic lands, prescription to other lands: and as the greater part of Italic lands (though not all) lay in Italy, and Italy was for some time lost to the Eastern emperors; therefore, practically, long before Justinian's legislation usucapion had reference to moveables, prescription to lands.

Hence it was the logical consequence of the constitution which assimilated Bonitary and Quiritary ownership (C. 7. 31) that prescription and usucapion were thenceforward identical in effect. The alteration of the periods required was rather a matter of detail than of principle.

solum in Italia, sed in omni terra quae nostro imperio gubernatur, dominia rerum iusta causa possessionis praecedente acquirantur¹.

1. Sed aliquando etiamsi maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit, veluti si quis liberum hominem vel rem sacram vel religiosam² vel servum fugitivum possideat. (2.) Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt, nam furtivarum rerum lex duodecim tabularum³ et lex Atinia inhibet usucapionem: vi possessorum lex Iulia et Plautia⁴. (3.) Quod autem dictum est

but in all the territory subject to our authority, provided only a just title to possession be precedent¹.

1. Sometimes, however, although a man be in possession in the most complete good faith, usucapion will not avail him through any length of time; for instance, if any one possess a free man, a thing sacred or religious², or a runaway slave. 2. Stolen things also and things possessed by violence cannot be acquired by use, even if possessed in good faith for the aforementioned long time: for a law of the Twelve Tables³ and the Lex Atinia prevent the usucapion of stolen things, and the Leges Julia and Plautia⁴ that of things possessed by violence.

¹ For ordinary usucapion or prescription, the requirements may be summed up as follows:

(1) Continuous possession for a definite time.

(2) Good faith on the part of the possessor: *bona fides*.

(3) A subject capable of usucapion or prescription: *res usucapioni habilis*.

(4) Good title, i.e. commencement of possession by virtue of some transaction recognized by law: *titulus, iusta causa*.

The want of the second requirement was fatal to usucapion or prescription both before and after Justinian's legislation, save in a few cases excepted for special reasons; see §§ 8, 11, of this title, and Gaius II. 52, 55—58.

The want of the third or fourth requirement was also fatal in olden times, but in Justinian's day had merely the effect of enlarging the time requisite to create ownership: one defect causing the term to become thirty years, both defects making forty years' possession necessary.

Mackeldey sums up the requirements in what he calls a verse (involving unhappily a false quantity),
*Res habilis, Titulus, Fides,
Possessio, Tempus.*

² II. 1. 7. The *res* is *non habilis*.

³ Tab. VIII. l. 17.

⁴ Lex Atinia, B.C. 197, referred to by Cicero in *Verrem*, II. 1. 42: Lex Plautia, B.C. 59, quoted by Cicero *Pro Mil.* 13, *ad Fam.* VIII. 8; Lex Julia de vi, temp. Augusti.

furtivarum et vi possessarum rerum usucapionem per legem prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet usucapere possit (nam his alia ratione usucapio non competit, quia scilicet mala fide possident); sed ne ullus alius, quamvis ab eis bona fide emerit vel ex alia causa acceperit, usucapiendi ius habet¹. Unde in rebus mobilibus non facile procedit, ut bonae fidei possessori usucapio competat. nam qui alienam rem vendidit vel ex alia causa tradidit furtum eius committit. (4.) Sed tamen id aliquando aliter se habet. nam si heres rem defuncto commodatam aut locatam vel apud eum depositam, existimans hereditariam esse, bona fide accipienti vendiderit aut donaverit aut dotis nomine dederit, quin is qui acceperit usucapere possit dubium non est, quippe ea res in furti vitium non ceciderit, cum utique heres qui bona fide tamquam suam alienaverit furtum non committit². (5.) item si is ad quem ancillae ususfructus pertinet, partum

3. But when we state that usucapion of things stolen or taken possession of by violence is prohibited by law, we do not mean that the thief himself, or the possessor by violence, cannot get ownership by usucapion (for usucapion does not run for such persons on another account, namely that they possess in bad faith); but that no one else has the right of usucapion, even though he buy from them, or receive from them on any other title, in good faith¹. Wherefore, in respect of moveables, it is difficult for usucapion to be available for a possessor in good faith, because he who has sold, or delivered on any other title, the property of another person, commits a theft of it. 4. Sometimes, however, it is otherwise. For if an heir, thinking that a thing lent or let to the deceased, or deposited with him, is part of the inheritance, has sold it, or given it or delivered it as a marriage-portion to another person, who receives it in good faith, there is no doubt that the receiver can acquire it by use, inasmuch as it is not tainted with theft; since the heir clearly committed no theft when he parted with it in good faith on the supposition that it was his own². 5. Also, if he to whom the

¹ *Iusta causa* is wanting; a transfer by a thief being in the eye of the law no valid conveyance.

² D. 41. 3. 36. pr. The heir himself could also acquire by use

under like circumstances, for it is a fair supposition on his part that all which he finds in the inheritance belonged to the deceased. D. 41. 5. 3, D. 41. 10. 5. 1.

suum esse credens, vendiderit aut donaverit, furtum non committit: furtum enim sine affectu furandi non committitur¹. (6.) aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur. (7.) Quod autem ad eas res quae solo continentur expeditius procedit; ut si quis loci vacantis possessionem propter absentiam aut negligentiam domini, aut quia sine successore decesserit, sine vi nanciscatur. qui quamvis ipse mala fide possidet (quia intellegit se alienum fundum occupasse), tamen si alii bona fide accipienti tradiderit, poterit ei longa possessione res acquiri, quia neque furtivum neque vi possessum accepit; abolita est enim quorundam veterum sententia², existimantium etiam fundi locive furtum fieri, et eorum qui res soli possident principalibus constitutionibus prospicitur, ne cui longa

usufruct of a female slave belongs, thinking that her offspring is his, sell it or give it away, he commits no theft: for theft is not committed without the intent of thieving¹. 6. And it can happen in other ways also, that a man may without the taint of theft deliver a thing belonging to another to a third person, and cause it to be gained through usucapion by the possessor. 7. But in respect of things appertaining to the soil acquisition by use occurs more readily: for example, when a man takes possession of a plot of land that is ownerless, either through the absence or carelessness of the owner, or because the owner has died without leaving a representative. For although the actual taker is a possessor in bad faith (inasmuch as he knows that he has seized upon the land of another), yet if he transfer it to one who receives it in good faith, the latter can acquire the property by long possession: because what he has received was neither stolen nor taken possession of by violence: for the opinion of certain lawyers of old time², who held that there could be a theft of land and place, is now exploded; and by certain imperial constitutions the interests of possessors of landed property are secured, so that a long and undisputed possession

¹ Gaius II. 50. We see from this that the Roman lawyers sometimes excused mistakes of law. The reason why this particular mistake was excused is explained in D. 41. 3. 36. 1, viz. that the usufructuary

supposes he has a right to the child of the *ancilla*, because the usufructuary of a flock of sheep has a right to the young of that flock.

² Sabinus, for instance, quoted by Aulus Gellius in XI. 18. 12 and 13.

et indubitata possessio auferri debeat. (8.) Aliquando etiam furtiva vel vi possessa res usucapi potest; veluti si in domini potestatem reversa fuerit¹. tunc enim vitio rei purgato procedit eius usucapio. (9.) Res fisci nostri usucapi non potest. Sed Papinianus scripsit bonis vacantibus fisco nondum nuntiatis bona fide emptorem sibi traditam rem ex his bonis usucapere posse; et ita divus Pius et divi Severus et Antoninus rescripserunt². (10.) Novissime sciendum est rem talem esse debere, ut in se non habeat vitium³, ut a bona fide emptore usucapi possit, vel qui ex alia iusta causa possidet.

11. Error autem falsae causae usucapionem non parit. veluti si quis, cum non emerit, emisit se existimans, possideat: vel cum ei donatum non fuerat, quasi ex donatione possideat⁴.

is not to be taken from any man. 8. Sometimes too a thing can be acquired by use, even though it has been stolen or possessed by violence: for instance, when it returns into the power of its owner¹: for then, the taint being purged away, usucapion of it runs on. 9. The property of our Treasury is not liable to usucapion. But Papinian asserted that when ownerless goods have not yet been reported to the Treasury, a purchaser in good faith can acquire by use any part of the goods which has been delivered to him: and the late Emperor Pius, as well as the late Emperors Severus and Antoninus, issued rescripts to this effect². 10. Lastly, we must take note that for a purchaser in good faith, or a possessor on other legitimate title, to be able to acquire a thing by use, the thing itself must be such that it is free from inherent taint³.

11. The mistake of an imaginary title, however, does not work usucapion: for instance, when a man who has not bought holds possession under the idea that he has bought: or when one to whom a thing was not given, holds possession under the idea that it was given⁴.

¹ This rule applies also when the thing has been stolen from a person who had hired or borrowed it, and afterwards comes into the hands of the owner. D. 41. 3. 4. 6. But the owner must receive it with the knowledge that it is his own, and not under the impression that the thief is really owner.

² Not now extant.

³ The following are *res inhililes*:

(1) *Res fisci*.

(2) *Res sacrae, religiosae, sanctae*.

(3) *Res dotales, res adventitiae filiorum familias*, &c. See Mackeldey's *Systema Juris Romani*, § 260.

⁴ Here there is no *titulus*, or *iusta causa*, the intention of donor and receiver not being identical.

12. *Durina possessio quae prodesse coeperat defuncto, et heredi et bonorum possessori¹ continuatur, licet ipse sciat praedium alienum: quodsi ille initium iustum non habuit, heredi et bonorum possessori, licet ignoranti, possessio non prodest. quod nostra constitutio² similiter et in usucapionibus observari constituit, ut tempora continentur.* (13.) Inter venditorem quoque et emptorem coniungi tempora divus Severus et Antoninus rescripserunt.

14. *Edicto divi Marci³ cavetur eum qui a fisco rem alienam emit, si post venditionem quinquennium praeterierit, posse dominum rei per exceptionem repellere. Constitutio autem divae memoriae Zenonis⁴ bene prospexit his qui a fisco per venditionem vel donationem vel alium titulum aliquid accipiunt, ut ipsi quidem securi statim fiant et victores existant, sive conveniantur sive experiantur; adversus sacratissimum autem aerarium usque ad quadriennium liceat intendere his*

12. Long possession, which has begun to count for the benefit of a dead person, is carried on in favour of his heir or *bonorum possessor*¹, though the latter may know that the land is another's. But if the title of the deceased was not lawful at the commencement, possession is of no avail for the heir and *bonorum possessor*, although they be in ignorance of the defect. And this rule a constitution² of ours has commanded to be observed with reference to usucapions also, in order to the times being conjoined. 13. The late Emperors Severus and Antoninus further declared by rescript that the times of possession of buyer and seller should be conjoined.

14. It is provided by an edict of the late Emperor Marcus³ that a person who has purchased from the Treasury property belonging to another, may, if five years have elapsed since the sale, defeat the owner of the thing by pleading this fact. But a constitution of Zeno, of sacred memory⁴, has wisely provided on behalf of those who receive any thing from the Treasury by sale or gift or other title, that they personally are to be secure at once, and come off victorious whether suing or sued: whilst those who think they have any right of action on the score of

¹ Sc. Inheritor by Praetorian Law.
² C. 7. 31.

³ Referred to in C. 2. 37. 3.
⁴ C. 7. 37. 2:

qui pro dominio vel hypotheca earum rerum quae alienatae sunt putaverint sibi *quasdam* competere actiones. Nostra autem divina constitutio¹ quam nuper promulgavimus etiam de his qui a nostra vel venerabilis Augustae domo aliquid acceperint, haec statuit quae in fiscalibus alienationibus praefatae Zenonianae constitutionis continentur.

TIT. VII. DE DONATIONIBUS.

Est etiam aliud genus acquisitionis, donatio². Donationum autem duo genera sunt: mortis causa, et non mortis causa. (1.) Mortis causa donatio est quae propter mortis fit suspicionem: cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset qui donavit, reciperet, vel si eum donationis poenituisset, aut prior decederet is cui donatum sit³. Hae mortis causa donationes ad

ownership or pledge of the property alienated, may sue the sacred Treasury within the space of four years. And a constitution of our own¹, which we have lately published, has extended to those who have received any thing from our palace, or from that of the august empress, the aforementioned provisions of Zeno's constitution relating to alienations on the part of the Treasury.

TIT. VII. ON GIFTS.

There is also another method of alienation, viz. gift². And of gifts there are two classes, those *mortis causa*, and those not *mortis causa*. 1. A gift *mortis causa* is one made in expectation of death; when a person gives upon condition that if any fatality happen to him, the receiver shall keep the article; but that if the donor should survive, or if he should change his mind, or if the donee should die first, then the donor shall have it back again³. These gifts *mortis causa* are

¹ C. 7. 37. 3.

² It was only in some cases that a gift was perfect without delivery: in which cases the acquisition was really *ex donatione*. But when the gift was not completed till delivery took place, the acquisition was more correctly *ex traditione*, and the

animus donandi was the *justa causa* legalizing the delivery.

³ The text plainly contemplates a delivery as well as a gift; but a mere gift, i. e. a promise without delivery, was equally efficacious; see D. 39. 6. 2, where it is stated that there are two varieties of *donatio mortis*

exemplum legatorum redactae sunt per omnia¹. nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oportet, et utriusque causae quaedam habebat insignia, et alii ad aliud genus eam retrahebant; a nobis constitutum est², ut per omnia fere legatis connumeretur, et sic procedat quemadmodum eam nostra formavit constitutio. Et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum cui donatur, magisque eum cui donat, quam heredem suum. sic et apud Homerum Telemachus donat Piraeo :

Πείραι', οὐ γάρ τ' ἴδμεν, ὅπως ἔσται τάδε ἔργα·
εἰ κεν ἐμὲ μνηστήρες ἀγήνορες ἐν μεγάροισι
λάβρην κτείναντες, πατρώια πάντα δάσωνται,
αὐτὸν ἔχοντά σε βούλομ' ἐπαυρέμεν, ἢ τινα τῶνδε·

in all respects¹ put upon the same footing as legacies. For since there was a difference of opinion amongst lawyers whether such a donation ought to be equivalent to a gift or to a legacy, possessing as it did some of the characteristics of each, so that some of them classed it with one and some with the other; a constitution was issued by us² ordaining that it should be classified with legacies in almost all respects, and should be solemnized in the manner which our constitution laid down. To put it briefly, a gift *mortis causa* is when a person wishes that he himself should have the gift in preference to the donee, but that the donee should have it in preference to his heir. And so, in Homer, Telemachus makes a present to Piraeus :

"Piraeus,—as we know not how these matters will result,—supposing the proud suitors slay me by stealth in the palace, and part amongst them all my ancestral goods, I wish you to have and enjoy (this treasure) rather than any of these men : but sup-

causa, one where the present "statim fit accipientis," the other where "non statim fit accipientis, sed tunc demum quum mors insecuta est."

¹ The word *fere* seems to have been omitted through oversight; for only a line or two below Justinian states that legacies and donations

mortis causa were alike not "in all respects," but "in almost all respects." They differed for instance in the fact that a donation was effectual the moment the donor died, whereas a legacy was not secure till the heir accepted the inheritance. D. 39. 6. 29.

² C. 8. 57. 4.

εἰ δέ κ' ἐγὼ τούτοις φόνον καὶ κῆρα φυτεύσω,
 δὴ τότε μοι χαίροντι φέρειν πρὸς δώματα χαίρων¹.

2. Aliae autem donationes sunt quae sine ulla mortis cogitatione fiunt, quas inter vivos appellamus, quae omnino non comparantur legatis; quae si fuerint perfectae, temere revocari non possunt. Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit; et ad exemplum venditionis nostra constitutio² eas etiam in se habere necessitatem traditionis voluit, ut etsi non tradantur habeant plenissimum et perfectum robur, et traditionis necessitas incumbat donatori. Et cum retro Principum dispositiones³ insinuari eas actis intervenientibus volebant, si maiores ducentorum fuerant solidorum, nostra constitutio et quantitatem usque ad quingentos solidos ampliavit quam stare et sine insinu-

posing I plant slaughter and death amongst them,—then that you bring it to my house, joyously to me in my joy¹.”

2. Gifts of another kind are those made without any thought of death, which we call *inter vivos*. These do not in any way resemble legacies, and cannot be revoked at pleasure when completed. They are completed so soon as the donor has made his intention clear, whether with or without writing: and in analogy to the case of a sale, a constitution of ours² has made these gifts to create the duty of delivering; so that even if there be no delivery at the time, yet they have most full and perfect effect, and an obligation to deliver is cast upon the donor. And whereas enactments of former emperors³ required them to be enrolled with public formalities if they exceeded the value of 200 *solidi*, our constitution has raised the amount to 500 *solidi*, and has ordained that a

¹ Hom. Odyss. XVII. 78—83.

² C. 8. 54. 35. 5. Previously a promise to give was not binding unless entered into by stipulation (III. 15), or put into writing, or made for certain objects favoured by law. See Cod. Theod. 8. 12. 4; Fr. Vat. 310. In consequence of Justinian's enactment an agreement to give, if framed in words of the

present tense, e. g. “do tibi centum aureos,” had the same effect as a stipulatory engagement, and furnished a ground of action; contrary to the old rule of law laid down in D. 2. 14. 7. 4: “Nuda pactio obligationem non parit, sed parit exceptionem.”

³ Fr. Vat. 249, 266, 268; Cod. Theod. 8. 12. 8. 1.

atione statuit; et quasdam donationes invenit quae penitus insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem¹. Alia insuper multa ad uberiores exitum donationum invenimus, quae omnia ex nostris constitutionibus quas super his posuimus colligenda sunt. Sciendum tamen est, quod etsi plenissimae sunt donationes, tamen si ingrati existant homines in quos beneficium collatum est, donatoribus per nostram constitutionem² licentiam praestavimus certis ex causis eas revocare: ne qui suas res in alios contulerunt ab his quandam patiantur iniuriam vel iacturam, secundum enumeratos in nostra constitutione modos. (3.) Est et aliud genus inter vivos donationum quod veteribus quidem prudentibus penitus erat incognitum, postea autem a iunioribus divis Principibus introductum est, quod ante nuptias vocabatur et tacitam in se condicionem habebat, ut tunc ratum esset, cum matrimonium fuerit insecutum; ideoque ante nuptias appellabatur, quod ante matrimonium efficiebatur et nusquam post

smaller gift shall stand good even without registration: besides which it has marked out certain kinds of gifts which require no registration at all, but have complete validity of themselves¹. And we have made many other provisions for the more certain execution of gifts, all of which are to be gathered from the constitutions which we have issued on this topic. But it must be noted that even when gifts are perfectly complete, we have nevertheless by one of our constitutions² given power to donors to revoke them in certain cases, if the recipients of the benefit prove ungrateful: in order that those who have bestowed their property on others may not suffer at their hands any injury or loss of the kinds enumerated in our constitution. 3. There is also another kind of gift *inter vivos*, which was altogether unknown to the ancient lawyers, but introduced afterwards by the more recent emperors; this used to be designated *ante nuptias*, conveying the implied condition that it was only to stand good when marriage ensued; and so it was called *ante nuptias*, from the fact that such a gift was always made previous

¹ Sc. gifts to redeem captives, gifts by generals to distinguished soldiers, gifts to sufferers by fire,

&c. C. 8. 54. 36.

² C. 8. 56. 10.

nuptias celebratas talis donatio procedebat¹. Sed primus quidem divus Iustinus, pater noster², cum augeri dotes et post nuptias fuerat permissum, si quid tale eveniret³, etiam ante nuptias donationem augeri et constante matrimonio sua constitutione⁴ permisit; sed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos, plenissimo finì tradere sanctiones cupientes et consequentia nomina rebus esse studentes, constituimus⁵, ut tales donationes non augeantur tantum, sed et constante matrimonio initium accipiant, et non ante nuptias, sed propter nuptias vocentur, et dotibus in hoc exaequantur, ut quemadmodum dotes et constante matrimonio non solum augentur, sed etiam fiunt, ita et istae donationes quae propter nuptias introductae sunt non solum antecedant matrimonium sed etiam eo contracto et augeantur et constituentur.

to marriage, and never conferred after the celebration¹. But as it was allowable for marriage-portions to be augmented even after marriage, the late Emperor Julian, our father², was the first to allow by a constitution of his³, that if anything of this kind occurred⁴, the gift *ante nuptias* might also be increased after the marriage was contracted: still, however, the inconvenient name remained, since the gift was called *ante nuptias*; and yet received the increase after marriage. We, therefore, wishing to issue full and comprehensive rules, and desiring that names should accord with facts, have ordained that such gifts may not only be increased, but even have their beginning during marriage, and that they shall be called not *ante nuptias*, but *propter nuptias*: and be put on the footing of marriage-portions in this respect, that just as marriage-portions can not only be increased, but also created during marriage, so too these gifts which were introduced "in respect of marriage" may not only precede marriage, but be increased or initiated after its celebration⁵.

¹ This species of gift is discussed in Note B in the Appendix.

² Julian was really the uncle of Justinian, but the latter emperor, having been associated with him in his authority, gives him the com-

plimentary title of father both here and elsewhere.

³ C. 5. 3. 19.

⁴ Sc. an increase of the *dos*.

⁵ C. 5. 3. 20.

4. Erat olim et alius modus civilis acquisitionis per ius accrescendi, quod est tale: si communem servum habens aliquis cum Titio solus libertatem ei imposuit vel vindicta vel testamento, eo casu pars eius amittebatur et socio accrescebat. Sed cum pessimum fuerat exemplo et libertate servum defraudari et ex ea humanioribus quidem dominis damnum inferri, severioribus autem lucrum accrescere: hoc quasi invidiae plenum pio remedio per nostram constitutionem¹ mederi necessarium duximus; et invenimus viam per quam et manumissor, et socius eius, et qui libertatem accepit, nostro fruuntur beneficio, libertate cum effectu procedente (cuius favore et antiquos leges multas et contra communes regulas statuuisse manifestissimum est²), et eo qui eam imposuit suae liberalitatis stabilitate gaudente, et socio indemni conservato, pretiumque servi secundum partem dominii quod nos definivimus accipiente.

4. There was formerly another method of acquisition under the civil law, namely, by right of accrual;—which is as follows: if any one who owned a slave in common with Titius, himself alone granted him liberty by *vindicta* or by testament, his share in such case was lost and accrued to his partner. But as it was of very evil precedent that the slave should be cheated out of his liberty, and loss thereby be inflicted on the more humane owners, whilst gain accrued to the more cruel ones; we have judged it necessary by a constitution of ours¹ to apply a remedy to a matter full of injustice; and have invented a method whereby both the manumitter, his partner, and the recipient of liberty may profit by our kindness: the gift of freedom being made effectual (in favour of which it is plain that even the legislators of old laid down many rules in contravention of ordinary regulations²), the grantor thereof being gladdened by the ratification of his benefit, and the partner being saved harmless by receiving the price of the slave according to his portion of ownership, after the tariff laid down by us.

¹ C. 7. 7. 1. 5.

² See examples in D. 5. 2. 8. 9;
D. 5. 2. 8. 17; D. 40. 4. 47. pr.;

D. 40. 12. 30; D. 50. 17. 20; D.
50. 17. 179; &c. &c.

TIT. VIII. QUIBUS ALIENARE LICET VEL NON.

Accidit aliquando, ut qui dominus sit alienare non possit, et contra qui dominus non sit alienandae rei potestatem habeat. Nam dotale praedium maritus invita muliere per legem Iuliam¹ prohibetur alienare, quamvis ipsius sit dotis causa ei datum. quod nos, legem Iuliam corrigentes, in meliorem statum deduximus. cum enim lex in soli tantummodo rebus locum habebat quae Italicae² fuerant, et alienationes inhibebat quae invita muliere fiebant, hypothecas autem earum etiam volente³: utrisque remedium imposuimus ut etiam in eas res quae in provinciali solo positae sunt interdicta fiat alienatio vel obligatio, et neutrum eorum neque consentientibus mulieribus procedat, ne sexus muliebris fragilitas in perniciem substantiae earum converteretur. 1. Contra autem creditor pignus ex pac-

TIT. VIII. WHO CAN ALIENATE AND WHO CANNOT.

Sometimes it happens that he who is owner cannot alienate, and on the other hand, that he who is not owner has the power of alienating. For by the Lex Julia¹ a husband is prevented from alienating land which forms part of a marriage-settlement without his wife's consent, although when given to him for the purpose of marriage-settlement it is his own. But we, amending the Lex Julia, have put this on a sounder footing: for whereas the *lex* applied only to such property as was Italic², and stopped alienations made against the wife's wish, and mortgages even when made with her consent³; we have effected an improvement in both respects, so that alienation and encumbrance are prohibited even of property situated on provincial soil, and neither shall take place, although there be consent on the part of wives; lest the weakness of their sex should be made use of for the dissipation of their property.

¹ Lex Julia de adulteriis, temp. Augusti: Paulus, S. R. II. 21. b.

² Gaius II. 63. See note on II. 1. 40.

³ The Senatusconsultum Velleianum made void a woman's covenant, though upholding her absolute gift: "Quia facilius se mulier obligat quam alicui donat:" D. 16. 1. 4. 1: and

in like manner the old law would allow a woman to consent to a sale, because the effect of that is clear to her; and would disregard her assent to a mortgage, because she could not be supposed to comprehend the complicated liability to which she thereby subjected herself.

tione, quamvis eius ea res non sit, alienare potest. sed hoc forsitan ideo videtur fieri, quod voluntate debitoris intellegitur pignus alienari, qui ab initio contractus pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur¹. sed ne creditores ius suum persequi impedirentur, neque debitores temere suarum rerum dominium amittere videantur, nostra constitutione² consultum est, et certus modus impositus est per quem pignorum distractio possit procedere, cuius tenore utrique parti, creditorum et debitorum, satis abundeque provisum est.

2. Nunc admonendi sumus neque pupillum neque pupillam ullam rem sine tutoris auctoritate alienare posse³. Ideoque si mutuam pecuniam alicui sine tutoris auctoritate dederit, non contrahit obligationem, quia pecuniam non facit accipientis. ideoque vindicari nummos possunt sicubi ex-

1. But, on the other hand, a creditor may, by virtue of agreement to that effect, alienate a pledge, although the article is not his own. And yet, perhaps, this may be considered as taking place through the pledge being regarded as alienated with consent of the debtor, who originally agreed that the creditor should have power to sell the pledge, if the money were not paid¹. But to prevent creditors being hindered in the enforcement of their rights, or debtors appearing to lose the ownership of their property too easily, precautions have been taken in a constitution of ours², and a specified process set out in accordance with which the sale of the pledges can be made; by the scope whereof sufficient and ample security is provided both for debtors and creditors.

2. We must next take note that no pupil, male or female, can alienate any thing without the authorization of the tutor³. Therefore if such person lend money to any one without the tutor's authorization he contracts no obligation, inasmuch as he does not make the money the property of the receiver;

¹ On which supposition it is no example of one man alienating what belongs to another. The presumption that the pledge could be sold was incontrovertible; so that even an agreement that "no sale was to take place," would be interpreted

to mean "no sale without notice," and after giving notice three separate times the creditor could proceed to sell. D. 13. 7. 4.

² C. 8. 34. 3.

³ I. 21, Gaius II. 80.

tent: sed si nummi quos mutuos dedit ab eo qui accepit bona fide consumpti sunt, condici possunt; si mala fide, ad exhibendum de his agi potest¹. at ex contrario omnes res pupillo et pupillae sine tutoris auctoritate recte dari possunt². Ideoque si debitor pupillo solvat, necessaria est tutoris auctoritas: alioquin non liberabitur. sed etiam hoc evidentissima ratione statutum est in constitutione³ quam ad Caesarienses advocatos, ex suggestione Triboniani, viri eminentissimi, Quaestoris sacri palatii nostri, promulgavimus, qua dispositum est ita licere tutori vel curatori debitorem pupillarem solvere, ut prius sententia iudicialis sine omni damno celebrata hoc permittat. quo subsecuto, si et iudex pronuntiaverit et debitor solverit, sequitur huiusmodi solutionem plenissima securitas. sin autem aliter quam disposuimus solutio facta fuerit, pecuniam autem salvam habeat pupillus aut ex ea locupletior sit, et

and so the coins can be recovered by a *vindicatio*, supposing they are still there: whilst if the borrowed coins have been expended in good faith by the person who received them, they are matter for a *condictio*; and if in bad faith, an action for their production can be brought¹. But, on the contrary, any thing may lawfully be given to a male or female pupil without the tutor's authorization². Hence, if a debtor make payment to a pupil, the tutor's authorization is necessary: otherwise the debtor will not be released. And this, which has reason most clearly on its side, we ourselves also have laid down in a constitution addressed to the advocates of Caesarea³ in accordance with the advice of the most excellent Tribonian, the Quaestor of our sacred palace, in which it is provided that payment may be made by a pupil's debtor to his tutor or curator, provided the assent of a judge, obtainable without any expense, be first received. So that when this course is pursued, i.e. when the judge has given the order and the debtor has paid, the most perfect security attends such method of payment. But if payment be made otherwise than we have ap-

¹ A *vindicatio* is for recovery of the article itself, a *real* action: a *condictio* is for the value of the article: an *actio ad exhibendum* is for production, or, if that be impossible, for payment of all the loss sustained by the plaintiff, which of

course may be considerably in excess of the actual market-value of the article. D. 10. 4. 9. 8.

² Gaius II. 83.

³ C. 5. 37. 25, extended by C. 5. 37. 27.

adhuc eandem summam petat, per exceptionem doli mali¹ sum-
moveri poterit; quodsi aut male consumpserit aut furto ami-
serit, nihil proderit debitori doli mali exceptio, sed nihilo-
minus damnabitur, quia tenere sine tutoris auctoritate et non
secundum nostram dispositionem solverit². sed ex diverso pupilli
vel pupillae solvere sine tutore auctore non possunt, quia id quod
solvunt non fit accipientis, cum scilicet nullius rei alienatio eis
sine tutoris auctoritate concessa est.

TIT. IX. PER QUAS PERSONAS NOBIS ACQUITUR.

Acquitur nobis non solum per nosmet ipsos, sed etiam
per eos quos in potestate habemus; item per eos servos in
quibus usumfructum habemus; item per homines liberos et

pointed, and the pupil have the money in hand or be enriched
thereby, and yet demand the same sum again, he can be met
by the plea of fraud¹: although if he have expended it foolishly
or lost it by theft, the plea of fraud will not be available for
the debtor; who must in spite of it be condemned, on the
ground that he has paid incautiously without the tutor's au-
thorization, and not according to our method². But, on the other
hand, pupils, whether male or female, cannot make a payment
without their tutor's authorization, because that which they
pay does not become the property of the receiver, for the plain
reason that no alienation may be made by them without
authorization by the tutor².

TIT. IX. THROUGH WHAT PERSONS ACQUISITION CAN BE MADE FOR US.

Property is acquired for us not only by our own means, but also
by means of those whom we have under our *potestas*: likewise
by means of those slaves in whom we have the usufruct:
likewise by means of free men and the slaves of others whom

¹ See note on II. 1. 30.

² The principle on which all these
rules are based is "that without

tutorial consent pupils may improve
their condition, but not do detri-
ment to it." Gaius II. 83.

s alienos quos bona fide possidemus. de quibus singulis ntius dispiciamus.

Igitur liberi vestri utriusque sexus quos in potestate is olim quidem, quicquid ad eos pervenerat, exceptis cet castrensibus pecuniis¹, hoc parentibus suis acquirebant illa distinctione; et hoc ita parentum fiebat, ut esset eis ia quod per unum vel unam eorum acquisitum est alii xtraneo donare vel vendere vel quocumque modo volu- applicare. quod nobis inhumanum visum est, et generali itutione emissa² et liberis peperimus et patribus debitum ravimus. sancitum etenim a nobis est, ut si quid ex re ei obveniat³, hoc secundum antiquam observationem

possess in good faith. These cases let us consider care- one by one.

In olden times, then, your descendants of either sex 1 you held under *potestas*, acquired for the benefit of their dants everything which came to them, without any distinc- ave that *peculia castrensia*, of course, were excepted¹: and roperty belonged so absolutely to the ascendants, that had the right to give the acquisition made through one r daughter to another or to a stranger, or sell it or apply any other purpose they pleased. But this rule appeared a harsh one; and so in a general constitution published ² we have relieved the descendants, and yet reserved for scendants their due. For we have ordained that whatever comes to a *filiusfamilias* in consequence of his ascend- roperty³, shall be wholly acquired by him for the as-

peculium originally meant pro- of the *paterfamilias*, held on fferance by the son or slave, which he could take back pleasure. *Peculium castrense* from the time of Augustus, allowed soldiers in *potestate* is to have an independent ty in their acquisitions made vice. The list of articles com- ded in *peculium castrense* was ily enlarged, and finally ex- l to gifts for outfit made to ldier, pay, plunder, gifts and

legacies from comrades, and the property of his wife. D. 49. 17. 3, 4, 8, 16 and 19. Not only soldiers but civil officers in *potestate parentis* were in Justinian's time allowed to have private and separate property, flowing from similar sources to those above enumerated, and called in the case of the latter class of persons, *peculium quasi castrense*. See II. 11. 6.

² C. 6. 61. 6.

³ This is called *peculium profecti- tium*.

totum parenti acquirat (quae enim invidia est, quod ex patris occasione profectum est, hoc ad eum reverti?); quod autem ex alia causa sibi *filiusfamilias* acquisivit¹, huius usumfructum² quidem patri acquirat, dominium autem apud eam remaneat, ne quod ei ex suis laboribus vel prospera fortuna accessit, hoc in alium perveniens, luctuosum ei procedat. (2.) Hoc quoque a nobis dispositum est et in ea specie, ubi parens emancipando liberum ex rebus quae acquisitionem effugiunt³ sibi partem tertiam retinere, si voluerat, licentiam ex anterioribus constitutionibus habebat, quasi pro pretio quodammodo emancipationis, et inhumanum quiddam accidebat, ut filius rerum suarum ex hac emancipatione dominio pro parte defraudetur, et quod honoris ei ex emancipatione additum est, quod sui iuris effectus est, hoc per rerum deminutionem decrescat. ideoque statui-

cendant's benefit, according to the ancient regulation, (for what is there objectionable in property reverting to the ascendant when it originated from him?); but whatever the *filiusfamilias* has gained for himself by other means¹, of this he shall acquire the usufruct² for the benefit of his ascendant, although the ownership shall abide in himself; to the end that an accession, derived from his own labour or from good fortune, may not be a cause of annoyance to him by its passing into the hands of another. 2. We have also legislated to the same effect on another matter, viz. that an ascendant was allowed by former constitutions to retain, if he pleased, when emancipating a descendant, one third of the property which was exempted from his acquisition³, to be a sort of price for the emancipation; and the unjust result followed that the son by such emancipation was deprived of the ownership of part of his property, and so through the impoverishment of his estate there was a diminution of the honour of being *sui juris*, which was conferred upon him in emancipation. Therefore we have ordained that in lieu of the third part of the ownership of the

¹ This was styled *peculium adventitium*. Although this description of *peculium* was not invented by Justinian, he greatly extended it; for previously it only comprehended

gifts to a *filiusfamilias* from his mother, maternal ancestor or wife. C. 6. 60. 1 and 2.

² II. 4.

³ Sc. *peculium adventitium*.

mus, ut parens pro tertia bonorum parte dominii quam retinere poterat dimidiam, non dominii rerum, sed ususfructus retineat: ita etenim et res intactae apud filium remanebunt, et pater ampliore summa fruetur, pro tertia dimidia potiturus¹.

3. Item vobis acquiritur quod servi vestri ex traditione nanciscuntur, sive quid stipulentur², vel ex qualibet alia causa acquirunt. hoc etenim vobis et ignorantibus et invitis obvenit. ipse enim servus qui in potestate alterius est nihil suum habere potest. sed si heres institutus sit, non alias nisi iussu vestro hereditatem adire potest³; et si iubentibus vobis adierit, vobis hereditas acquiritur perinde ac si vos ipsi heredes instituti essetis. et convenienter scilicet legatum per eos vobis acquiritur. Non solum autem proprietas per eos quos in potestate habetis acquiritur vobis, sed etiam possessio⁴: cuiuscumque enim rei possessionem adepti fuerint, id vos possidere videmini.

property, which the ascendant used to be able to withhold, he shall retain a half, not of the ownership, but of the usufruct: for thus the property will remain with the son undiminished, whilst the father will have the enjoyment of a larger amount, getting a half instead of a third¹. 3. Again, the acquisition is for your benefit when your slaves obtain anything by delivery, or stipulate for anything², or acquire in any other manner: for this accrues to you even without your knowledge and against your wish: since the slave himself, being under *potestas* of another, can have nothing of his own. But if he be instituted heir, he cannot enter on the inheritance except by your command³: and if he enter by your command, the inheritance is acquired by you, just as if you had personally been appointed heir. And of course a legacy is in like manner acquired for you by your slaves. And not only is ownership acquired for you by those under your *potestas*, but possession also⁴: for of whatever thing they have obtained possession, that you are

¹ C. 6. 61. 6. 3. ² III. 15.

³ For the inheritance might be insolvent, and so he would involve his master in loss. Gaius II. 87; Ulpian XIX. 19.

⁴ Possession, however, unlike ownership, cannot be acquired for

another without that other's knowledge and consent: for the *animus domini*, or intent to be owner, must exist not only in a personal but also in a derivative possession, such as that taken by a slave for his master. See Savigny, *On Poss.* § 28.

unde etiam per eos usucapio vel longi temporis possessio vobis accedit.

4. De his autem servis in quibus tantum usumfructum habetis ita placuit, ut quicquid ex re vestra vel ex operibus suis acquirant, id vobis adiiciatur: quod vero extra eas causas persecuti sunt, id ad dominum proprietatis pertineat. itaque si is servus heres institutus sit legatumve quid ei aut donatum fuerit, non usufructuario, sed domino proprietatis acquiritur. Idem placet et de eo qui a vobis bona fide possidetur, sive is liber sit sive alienus servus. quod enim placuit de usufructuario, idem placet et de bona fide possessore. itaque quod extra duas istas causas acquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus est. Sed bonae fidei possessor cum usuceperit servum, quia eo modo dominus fit, ex omnibus causis per eum sibi acquirere potest: fructuarius vero usucapere non potest, primum quia non possidet, sed habet ius utendi fruendi; deinde quia scit servum alienum esse¹.

regarded as possessing. Hence also usucapion or possession for length of time accrues to you by their means.

4. But with regard to slaves in whom you have merely an usufruct, the rule has been established that whatever they acquire by means of your substance or their own labour is acquired for you: but whatever they obtain from other sources than these, belongs to their proprietor. Therefore, if such a slave be instituted heir, or any legacy or gift be conferred upon him, it is acquired not for the usufructuary but for the proprietor. The rule is the same as to one who is possessed by you in good faith, whether he be free or the slave of another: for whatever holds good as to an usufructuary, also holds good as to a possessor in good faith. Therefore, whatever is acquired from causes other than these two either belongs to the man himself, if he be free, or to his master, if he be a slave. But when a possessor in good faith has gained the slave by usucapion, since he thus becomes his owner, he can acquire by his means in every case: but an usufructuary cannot gain him by usucapion: firstly, because he does not possess, but has only the right of usufruct: and secondly, because he knows the slave to be another's¹. Further, not only owner-

¹ He plainly is without two of possession and *bona fides*. See note the essentials for usucapion, viz. on II. 6. pr.

Non solum autem proprietas per eos servos in quibus usumfructum habetis, vel quos bona fide possidetis, vel per liberam personam quae bona fide vobis servit, acquiritur vobis, sed etiam possessio. loquimur autem in utriusque persona secundum definitionem quam proxime exposuimus, id est si quam possessionem ex re vestra vel ex operibus suis adepti fuerint. (5.) Ex his itaque apparet per liberos homines, quos neque iuri vestro subiectos habetis neque bona fide possidetis, item per alienos servos, in quibus neque usumfructum habetis neque iustam possessionem, nulla ex causa vobis acquiri posse. et hoc est quod dicitur per extraneam personam nihil acquiri posse: excepto eo, quod per liberam personam, veluti per procuratorem², placet non solum scientibus, sed etiam ignorantibus vobis acquiri possessionem; secundum divi Severi constitutionem¹, et per hanc possessionem etiam dominium, si dominus fuit qui tradidit, vel usucapionem aut longi temporis praescriptionem, si dominus non sit.

ship, but possession too is acquired for you by means of slaves in whom you have the usufruct, or whom you possess in good faith, or by a free person who serves you in good faith. But in both instances we are speaking with a reference to the qualification which we laid down just above, viz. that it is so only when they acquire possession by means of your substance or their own labour. 5. Hence, from what has been said, it appears that in no case can anything be acquired for you by means of free men whom you neither have subject to your authority nor possess in good faith, nor by means of the slaves of others in whom you have neither the usufruct nor the lawful possession. And from this comes the saying, that nothing can be acquired for you through a stranger: with one exception, introduced by a constitution of the late emperor Severus¹, that possession may be acquired for your benefit by means of a free person, such as a *procurator*², not only with your knowledge, but even without it; and through such possession ownership also, if he who made delivery were the owner; or usucapion or prescription through length of time, if he were not owner.

¹ C. 7. 32. 1. But the possession did not begin to run in your favour till you knew and approved; although when you did know and

approve, the approval related back to the commencement of the possession.

² IV. 10. 1.

6. Hactenus tantisper admonuisse sufficit quemadmodum singulae res acquiruntur: nam legatorum ius, quo et ipso singulae res vobis acquiruntur, item fideicommissorum, ubi singulae res vobis relinquuntur, opportunius inferiore loco referemus¹. Videamus itaque nunc quibus modis per universitatem res vobis acquiruntur. si cui ergo heredes facti sitis, sive cuius bonorum possessionem petieritis², vel si quem arrogaveritis³, vel si cuius bona libertatum conservandarum causa vobis addicta fuerint⁴, eius res omnes ad vos transeunt.

Ac prius de hereditatibus dispiciamus, quarum duplex condicio est: nam vel ex testamento, vel ab intestato ad vos pertinent.

Et prius est, ut de his dispiciamus quae vobis ex testamento obveniunt, qua in re necessarium est initium de ordinandis testamentis exponere.

6. This much it is sufficient to have laid down at present as to the methods whereby particular things are acquired: for the law of legacies, whereby also you acquire particular things, and that of trusts, whereby particular things are left to you, we shall state more conveniently hereafter¹. Let us, therefore, now consider how things are acquired by you in the aggregate. If then you have been made heir to any one, or if you claim the possession of any man's goods², or if you arrogate any one³, or if the goods of a person are assigned to you for the confirming of gifts of freedom⁴: the whole of the property of such person passes to you,

And first, let us consider the subject of inheritances, which are of two descriptions: for they devolve upon you either by testament or by intestacy.

We must commence then with the consideration of what comes to you by testament; on which topic it is needful to start with an explanation of the method in which testaments should be executed.

¹ II. 20; II. 24.

² III. 9.

³ I. II, 1.

⁴ III. II.

TIT. X. DE TESTAMENTIS ORDINANDIS.

Testamentum ex eo appellatur, quod testatio mentis sit¹. (1.) Sed ut nihil antiquitatis penitus ignoretur, sciendum est olim quidem duo genera testamentorum in usu fuisse, quorum altero in pace et in otio utebantur quod calatis comitiis appellabant, altero cum in proelium exituri essent quod procinctum dicebatur². accessit deinde tertium genus testamentorum quod dicebatur per aes et libram³, scilicet quia per emancipationem, id est imaginariam quandam venditionem, agebatur, quinque testibus et libripende, civibus Romanis puberibus, praesentibus, et eo qui familiae emptor dicebatur⁴. sed illa quidem priora duo genera testamentorum ex veteribus temporibus in desuetu-

TIT. X. ON THE EXECUTION OF TESTAMENTS.

A testament derives its name from the fact that it testifies our intent¹.

1. But that no point of antiquity may be altogether unknown, we must bear in mind that originally there were two kinds of testaments in use; one of which men employed during times of peace and quiet, and styled "testament at *comitia calata*;" the other when about to issue forth for battle, and named it "testament in *procinctu*." A third variety was subsequently added², called the testament "*per aes et libram*" (by coin and balance), because it was effected by means of a certain imaginary sale, in the presence of five witnesses and a balance-holder, Roman citizens of the age of puberty, as well as another person who was styled the *familiae emptor* (purchaser of the estate)⁴. But the two species of testaments first-named have long ago fallen into disuse: whilst that which was effected

¹ Ulp. XX. 1.

² See Gaius II. 101, and our notes thereupon.

³ It is not known when this method was introduced, but possibly by the Twelve Tables, which at any rate contained the enactment, "Uti

legassit super pecunia tutelave suae rei ita ius esto." Tab. v. l. 3.

⁴ Originally the *familiae emptor* was the heir himself: afterwards a stranger without interest in the testament. See Gaius II. 103, 104, for a full explanation of this matter.

dinem abierunt; quod vero per aes et libram fiebat, licet diutius permansit, attamen partim¹ et hoc in usu esse desiit.

2. Sed praedicta quidem nomina testamentorum ad ius civile referebantur. postea vero ex edicto Praetoris alia forma faciendorum testamentorum introducta est: iure enim honorario² nulla emancipatio desiderabatur, sed septem testium signa sufficiebant, cum iure civili signa testium non erant necessaria.

(3.) Sed cum paulatim, tam ex usu hominum quam ex constitutionum emendationibus, coepit in unam consonantiam ius civile et praetorium iungi, constitutum est³, ut uno eodemque tempore (quod ius civile quodammodo⁴ exigebat) septem testibus adhibitis, et subscriptione testium (quod ex constitutionibus inventum est), et (ex edicto Praetoris) signacula testamentis imponerentur⁵: ut hoc ius tripertitum esse videatur, ut testes quidem et eorum praesentia uno contextu testamenti celebrandi

by coin and balance, although it continued longer, has now also, as to part of it¹, ceased to be employed.

2. The varieties of testaments already named were connected with the civil law: but afterwards another method of executing testaments was introduced by the Edict of the Praetor: for by his honorary law² no sale by mancipation was required, the seals of seven witnesses being sufficient; whereas, according to the civil law, the seals of the witnesses were not necessary. 3. But when by degrees, partly through the custom of the people and partly through the emendments of constitutions, the civil and praetorian law began to be drawn into harmony, it was established³ that testaments should be completed at one time (a rule on which the civil law to some extent⁴ insisted) in the presence of seven witnesses, and with an attestation by these witnesses (the latter rule an innovation of the constitutions), and that their seals should be impressed on the testaments⁵ (in accordance with the Praetor's edict): so that this rule seems of triple origin, since witnesses and their continuous presence in order to the execution of a testament

¹ Justinian explains his own meaning just below, in § 3.

² I. 2. 7.

³ In C. 6. 23, 21; enacted by Justinian himself.

⁴ He inserts the qualification *quodammodo*, because the civil law did

not insist on *seven* witnesses, but required *five* (or *six* if we regard the *libripens* as another); the *familia emptor* being in those days a party and not a mere witness.

⁵ On the wax joining their edges, or on the strings or other fastenings.

gratia a iure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto Praetoris¹.

(4.) Sed his omnibus ex nostra constitutione² propter testamentorum sinceritatem, ut nulla fraus adhibeatur, hoc additum est, ut per manum testatoris vel testium nomen heredis exprimatur, et omnia secundum illius constitutionis tenorem procedant.

5. Possunt autem testes omnes et uno anulo signare testamentum (quid enim si septem anuli una sculptura fuerint?) secundum quod Pomponio visum est. sed et alieno quoque anulo licet signare. (6.) Testes autem adhiberi possunt hi cum quibus testamenti factio est³. sed neque mulier, neque

are derived from the civil law; the attestations of the testator and of the witnesses are introduced in accordance with the sacred constitutions; whilst their seals and their number are requirements of the Praetor's Edict¹. 4. But by a constitution of our own², in order to secure the genuineness of testaments and prevent any fraud, this further formality was added, that the name of the heir must be written by the hand of the testator or a witness, and that all things must be done in conformity with the tenour of that constitution.

5. The witnesses, according to Pomponius' opinion, may all seal the testament with one signet (for what if all their rings bore one device³?), and may even seal with the ring belonging to another person (not a witness at all). 6. And those may be employed as witnesses with whom the testator has *testamenti factio*³. But neither a woman nor a person under puberty, nor

¹ The six requirements of the *testamentum tripartitum* may therefore be thus tabulated, though it is plain the tabulation is somewhat artificial:

(1) Requirements of the Civil Law:

(a) The execution *uno contextu*;
(β) *Some* witnesses.

(2) Requirements of the Edict:
(γ) Number of witnesses—viz. *seven*;

(δ) Sealing by witnesses.

(3) Requirements of the Constitutions:

(e) Signing by the witnesses;
Signing by the testator.

² C. 6. 23. 29.

³ *Testamenti factio* is used in three different senses by law-writers;

(1) The legal capacity of making a testament: *testamenti factio activa*;

(2) The legal capacity of taking under a testament: *testamenti factio passiva*;

(3) The legal capacity of being a witness to a testament: *testamenti factio relativa*.

The first and second varieties of

impubes, neque servus, neque mutus, neque surdus, neque furiosus¹, nec cui bonis interdictum est², nec is quem leges iubent improbum intestabilemque esse³, possunt in numero testium adhiberi. (7.) Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur, postea vero servus apparuit, tam divus Hadrianus Catonio Vero⁴, quam postea divi Severus et Antoninus rescripserunt, subvenire se ex sua liberalitate testamento, ut sic habeatur, atque si, ut oportet, factum esset, cum eo tempore quo testamentum signaretur omnium consensu hic testis liberorum loco fuerit, nec quisquam esset qui ei status quaestionem moveat. (8.) Pater, nec non is qui in potestate eius est, item duo fratres qui in eiusdem patris potestate sunt, utrique testes in unum

a slave, nor a dumb man, nor a deaf man, nor a madman¹, nor one interdicted from his property², nor one whom the laws declare infamous and unworthy of credit³, may be included in the number of the witnesses. 7. When, however, one of the witnesses to a testament was thought to be free at the time the testament was made, and afterwards proved to be a slave, the late emperor Hadrian declared in a rescript to Catonius Verus⁴, (as also did the late emperors Severus and Antoninus afterwards), "that he would of his bounty support the testament, so that it should be accounted as if duly made, since at the time when the testament was sealed this witness was by the consent of all parties viewed as a free man, nor was there any one who raised the question of his status." 8. A father and a person under his *potestas*, or two brothers under the *potestas*

testamenti factio are entirely dependent on status, whereas *testamenti factio* of the third kind depends not only on the status of the proposed witness, but on his relationship to other people, so that it is properly styled "relative." The tie of *patria potestas*, for instance, existing between the testator or heir (or in earlier times the *familia emptor*) and any other person, made the latter a bad witness: so also did the fact of the testator or heir and the third person being under one and the same *potestas*.

¹ Ulp. xix. 7. Yet all of them have *testamenti factio* in the second of the senses of the preceding note; and a woman, a deaf man and a dumb man had it in the first. See II. 12. 3.

² Sc. a prodigal.

³ Such were persons convicted of libel, adultery, peculation, extortion, riot, denial of their signatures, &c. See D. 28. 1. 18. 1; 22. 5. 14; 22. 5. 15; Theophilus, § 152, Ed. Savign.

⁴ C. 6. 23, 1.

testamentum fieri possunt: quia nihil nocet ex una domo plures testes alieno negotio adhiberi. (9.) In testibus autem non debet esse qui in potestate testatoris est. sed si filiusfamilias de castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur nec is qui in potestate eiusdem patris est: reprobatur enim in ea re domesticum testimonium. (10.) Sed neque heres scriptus, neque is qui in potestate eius est, neque pater eius qui habet eum in potestate, neque fratres qui in eiusdem patris potestate sunt, testes adhiberi possunt: quia totum hoc negotium quod agitur testamenti ordinandi gratia creditur hodie inter heredem et testatorem agi. licet enim totum ius tale conturbatum fuerat, et veteres qui familiae emptorem et eos qui per potestatem ei coadunati fuerant testamentariis testimoniis repellebant, heredi et his qui coniuncti ei per potestatem fuerant concedeabant testimonia in testamentis praestare, licet hi qui id permittebant hoc iure minime abuti debere eos suadebant¹: tamen nos, eandem observa-

of the same father, may both be witnesses to the same testament: because there is no harm in several witnesses from the same family being employed in the business of a third party. 9. But a person under the *potestas* of the testator ought not to be one of the witnesses. And if a *filiusfamilias* after his dismissal from service make a testament as to his *castrense peculium*, neither his father nor any one under the *potestas* of his father can be lawfully introduced as a witness: for in such a transaction the evidence of a member of the same household is rejected. 10. Neither the appointed heir, nor a person under his *potestas*, nor his father who has him under *potestas*, nor his brothers who are under the *potestas* of the same father, can be employed as witnesses: because the whole of the business which is done in order to the execution of the testament is now-a-days considered to be transacted between the heir and the testator. For although the whole of the law on this subject used to be in confusion; and the ancients, who debarred the *familiae emptor*, and those conjoined with him through *potestas*, from bearing witness to testaments, allowed the heir, and those conjoined through *potestas* with him, to act as witnesses; and yet, whilst allowing the right, advised them to abuse it as little as possible¹: we, nevertheless, remodelling the

¹ Gaius II. 105—108.

tionem corrigentes, et quod ab illis suasum est in legis necessitatem transferentes, ad imitationem pristini familiae emptoris, merito nec heredi qui imaginem vetustissimi familiae emptoris¹ obtinet, nec aliis personis quae ei, ut dictum est, coniunctae sunt², licentiam concedimus sibi quodammodo testimonia praestare; ideoque nec huiusmodi veterem constitutionem nostro codici inseri permisimus. (11.) Legatariis autem et fideicommissariis, quia non iuris successores sunt, et aliis personis eis coniunctis testimonium non denegamus—imo in quadam nostra constitutione³ et hoc specialiter concessimus—, et multo magis his qui in eorum potestate sunt, vel qui eos habent in potestate, huiusmodi licentiam damus.

12. Nihil autem interest, testamentum in tabulis, an in

rule and turning into a legal obligation what was merely advised by the ancients, have with good reason and in accordance with (the regulation about) the ancient *familiae emptor*, forbidden the heir also, by reason of his resemblance to that ancient *familiae emptor*¹, as well as all persons who are connected with him in the way before-mentioned², to bear witness as it were on their own behalf: and, therefore, we have not allowed the ancient constitution to this effect to be inserted in our code. 11. But we do not refuse this right of being witnesses to legatees and beneficiaries under a trust, because they are not successors in the rights of the deceased, nor do we refuse it to other persons connected with them:—in fact we have in one of our constitutions³ expressly granted it to themselves,—and much more do we allow it to those under whose *potestas* they are, or to those who have them under their *potestas*.

12. It makes no difference whether a testament be written

¹ The *familiae emptor*, as already stated, was in olden times the heir himself: the ancient prohibitions were therefore directed against relatives of the *familiae emptor*, because he was heir: hence, lawyers of later ages were following the letter and contravening the spirit of the laws when they allowed the heir and his relatives to be witnesses. Justinian, therefore, did not innovate, but re-

stored the original rule, when he recognized the identity of the heir of later days with the original *familiae emptor*, and transferred the prohibition from the one set of persons to the other.

² Sc. by the tie of *patria potestas*, directly or collaterally.

³ This constitution is not to be found in the Code.

chartis membranisque, vel in alia materia fiat. (13.) Sed et unum testamentum pluribus codicibus conficere quis potest secundum obtinentem tamen observationem omnibus factis. quod interdum et necessarium est, si quis navigaturus et secum ferre et domi relinquere iudiciorum suorum contestationem velit, vel propter alias innumerabiles causas quae humanis necessitatibus imminet. (14.) Sed haec quidem de testamentis quae in scriptis conficiuntur. Si quis autem voluerit sine scriptis ordinare iure civili testamentum, septem testibus adhibitis, et sua voluntate coram eis nuncupata, sciat hoc perfectissimum testamentum iure civili firmumque constitutum.

TIT. XI. DE MILITARI TESTAMENTO.

Supradicta diligens observatio in ordinandis testamentis militibus propter nimiam imperitiam constitutionibus principalibus¹ remissa est. nam quamvis hi neque legitimum nume-

on tablets or on paper, parchment or other material. 13. A man may also execute any number of duplicates of his testament provided only that all be executed according to the rule prescribed. And this is sometimes a necessity, when a man who is about to make a voyage wishes both to take with him and to leave at home an evidence of his intentions: or for the other numberless reasons which are connected with the requirements of mankind. 14. These then are the rules regarding testaments reduced to writing. But if any one desire to execute a testament without writing, in accordance with the civil law, let him rest assured that if seven witnesses be called together and his purposes be stated verbally in their presence, a most complete and valid testament is thereby established according to the civil law.

TIT. XI. ON THE TESTAMENT OF A SOLDIER.

By various imperial constitutions¹, the above-mentioned strictness of formality in the execution of testaments has been dispensed with in the case of soldiers, on account of their

¹ Some of these are named in D. 29. 1. 1 pr. viz. one of Julius Cæsar of a temporary character, and

others of Titus, Domitian, Nerva and Trajan, which conferred that privilege permanently.

rum testium adhibuerint, neque aliam testamentorum sollemnitatem observaverint, recte nihilominus testantur, videlicet cum in expeditionibus occupati sunt: quod merito nostra constitutio induxit¹. quoquo enim modo voluntas eius suprema sive scripta inveniatur sive sine scriptura, valet testamentum ex voluntate eius. Illis autem temporibus, per quae citra expeditionum necessitatem in aliis locis vel in suis sedibus degunt, minime ad vindicandum tale privilegium adiuvantur. sed testari quidem, etsi filiifamilias sunt, propter militiam conceduntur, iure tamen communi; eadem observatione et in eorum testamentis adhibenda quam et in testamentis paganorum proxime exposuimus. (1.) Plane de militum testamentis divus Traianus Statilio Severo ita rescripsit: id privilegium quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intellegi debet, ut utique prius constare debeat testamentum factum

excessive want of skill: for even if such persons have not employed the lawful number of witnesses, nor attended to some other testamentary solemnity, still they make valid testaments: that is to say, when they are engaged in actual service; a proviso most properly introduced by a constitution of our own¹. In whatever manner, therefore, a soldier's intent can be discovered, whether in writing or without writing, his testament stands good by virtue of his intent. But during those seasons when they are living exempt from the necessity of service, at their own homes or in other places, they are not supported in their claim for such exemption: and yet on account of their military profession they are allowed to make a testament, even though they be *filiifamiliarum*; but only in accordance with the usual regulations, the same formalities being insisted on in their testaments, which we have already set forth in regard to the testaments of civilians. 1. The late emperor Trajan wrote explicitly to Statilius Severus on the subject of soldiers' testaments to this effect: "The privilege granted to those on service, that their testaments shall be valid in whatever way they have been made by them, ought to be thus understood; that at any rate it should first be clear that a testa-

¹ C. 6. 21. 17.

esse¹, quod et sine scriptura a non militans quique fieri potest. is ergo miles de cuius bonis apud te quaeritur, si convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet quem vellet sibi esse heredem et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus, et voluntas eius rata habenda est. ceterum si (ut plerumque sermonibus fieri solet) dixit alicui: ego te heredem facio, aut tibi bona mea relinquo; non oportet hoc pro testamento observari. nec ullorum magis interest, quam ipsorum quibus id privilegium datum est, eiusmodi exemplum non admitti: alioquin non difficulter post mortem alicuius militis testes existerent, qui affirmarent se audisse dicentem aliquem relinquere se bona cui visum sit, et per hoc iudicia vera subvertantur. (2.) Quinimo et mutus et surdus miles tes-

ment was made¹; and one can be made without writing even by non-military persons. If, therefore, the soldier whose property is the matter of action before you, called people together for the very purpose of testifying his intent, and spoke in such manner as to make clear what person he wished to be his heir, and to what person he wished to give liberty, he may be considered to have thus made a testament without writing, and his intent is to be considered binding. But if, as often happens in conversation, he said to some person, I make you my heir, or I leave you my goods, this ought not to be considered a testament: and it concerns no one more than the persons themselves to whom this privilege is granted, that a precedent of this kind should not be allowed: otherwise witnesses could without difficulty be procured after the death of a soldier, who would assert that they had heard him say that he left his goods to any one they pleased, and thereby his real intentions might be upset. 2. A soldier may make a testament, even though

¹ As a rule two witnesses would be required to establish this; as we see from D. 22. 5. 12, and from Suetonius' *Domitian*, § 12, "Confiscabantur alienissimæ hereditates vel existente uno, qui diceret, audisse

se ex defuncto, cum viveret, heredem sibi Caesarem esse;" Suetonius plainly considering it illegal that *one* witness should be allowed to prove the fact.

tamentum facere potest¹. (3.) Sed hactenus hoc illis a principalibus constitutionibus conceditur, quatenus militant et in castris degunt; post missionem vero veterani, vel extra castra si faciant adhuc militantes testamentum, communi omnium civium Romanorum iure facere debent. Et quod in castris fecerint testamentum, non communi iure sed quomodo voluerint, post missionem intra annum tantum valebit². quid igitur si intra annum quidem decesserit, condicio autem heredi adscripta post annum extiterit? an quasi militis testamentum valeat? et placet valere quasi militis³. (4.) Sed et si quis ante militiam non iure fecit testamentum, et miles factus et in expeditione degens resignavit illud et quaedam adiecit sive detraxit, vel alias manifesta est militis voluntas hoc valere volentis, dicendum est valere testamentum quasi ex nova militis voluntate⁴. (5.) Denique et si in arrogationem datus fuerit miles, vel filiusfamilias emancipatus est, testamentum

he be dumb or deaf¹. 3. But this concession is made to soldiers by the imperial constitutions only so long as they are on service and live in the camp: whereas veterans after their discharge, and soldiers still on service who make a testament whilst absent from the camp, must proceed according to the rules common to all Roman citizens. And a testament which they have made in the camp, not according to the usual form but in such manner as they pleased, will be valid only within one year after their discharge². What then, supposing the soldier died within the year, but the condition imposed on his heir were not fulfilled till after the year? Would the testament stand good, as being a soldier's? It is ruled that would stand good as such³. 4. And again, if any one made an irregular testament before he was a soldier, and then having become a soldier and being on service, unsealed it and made additions or omissions, or if his intent that it should stand good were manifested in any other way, we must allow that the testament is valid on the ground of his new intent as a soldier⁴. 5. Lastly, if a soldier give himself in arrogation, or, supposing him a

¹ D. 29. 1. 4.

² Ulp. xxiii. 10. But the testament only stood good for a year after discharge, when the discharge

was an honourable one and not for a fault. D. 29. 1. 38. 1.

³ D. 29. 1. 38.

⁴ D. 29. 1. 20. 1.

eius quasi militis ex nova voluntate valet, nec videtur capitis deminutione irritum fieri¹.

6. Sciendum tamen est, quod ad exemplum castrensis peculii, tam anteriores leges² quam principales constitutiones³ quibusdam quasi castrensia addiderunt peculia, et quorum quibusdam permissum erat etiam in potestate degentibus testari⁴: quod nostra constitutio⁵ latius extendens, permisit omnibus in his tantummodo peculiis testari quidem, sed iure communi. cuius constitutionis tenore perspecto, licentia est nihil eorum quae ad praefatum ius pertinent ignorare.

filiusfamilias, be emancipated, his testament stands good as that of a soldier by any new indication of intent, and is not considered to become ineffectual through his *capitis deminutio*¹.

6. We must also observe that, after the analogy of the *castrense peculium*, both ancient laws² and constitutions of the emperors conferred on certain persons³ a *quasi-castrense peculium*; and some of them were further permitted to make a testament even whilst they continued under *potestas*⁴: which privilege a constitution of ours⁵ has extended more widely, and has allowed them all to make a testament in reference merely to this *peculium*, but with the usual formalities. And by reading the provisions of this constitution, you are able to avoid ignorance of any of the points relating to the right just named.

¹ In the first case a testament originally applying to all his property still served to pass his *peculium castrense*: in the second a testament originally applying to *peculium castrense* only, became a testament as to all his property. D. 29. 1. 22 and 23.

² We must not suppose from the mention of *leges*, that *quasi-castrense peculium* dates from republican times. *Peculium castrense* itself was an invention of Augustus, and *peculium quasi castrense*, which was allowed *ad exemplum castrensis*, must have been later still; in fact it is scarcely named before Constantine's day. See C. 12. 31. Certain excerpts from Ulpian, quoted in the Digest, e.g. in D. 36. 1. 1. 6,

D. 37. 1. 3. 5, contain references to it; but it is strongly suspected that the compilers of the Digest interpolated the words *quasi castrense*, Ulpian's remarks having been with reference to *peculium castrense* only.

³ C. 12. 31.

⁴ These persons were *proconsules*, *praefecti legionum*, *praesides provinciarum*, &c. (C. 3. 28. 37), but they could not, like soldiers, make a testament in such form as they pleased, but only with the full formalities; a qualification still insisted on by Justinian when he granted *testamenti factio* to all owners of *quasi-castrense peculium*.

⁵ C. 3. 28. 37.

TIT. XII. QUIBUS NON EST PERMISSUM TESTAMENTA FACERE.

Non tamen omnibus licet facere testamentum. Statim enim hi qui alieno iuri subiecti sunt testamentum faciendi ius non habent, adeo quidem, ut quamvis parentes eis permiserint, nihilo magis iure testari possunt¹: exceptis his quos antea enumeravimus, et praecipue militibus qui in potestate parentum sunt, quibus de eo quod in castris acquisierint permissum est ex constitutionibus Principum testamentum facere. quod quidem ius initio tantum militantibus datum est, tam ex auctoritate divi Augusti, quam Nervae, nec non optimi Imperatoris Traiani; postea vero subscriptione² divi Hadriani etiam dimissis militia, id est veteranis concessum est. itaque si quidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum quem heredem reliquerint; si vero intestati decesserint,

TIT. XII. WHAT PERSONS ARE NOT ALLOWED TO MAKE TESTAMENTS.

It is not, however, permitted to all persons to make a testament. For, in the first place, those who are subject to another's authority have not the right of making a testament; so much so that even if their ascendants have granted them permission, they still cannot make one lawfully¹: an exception being made in favour of those whom we have previously enumerated, and especially in favour of soldiers who are under parental *potestas*, to whom permission is given by imperial constitutions to make a testament in regard of their acquisitions in camp. And this right was originally conferred only on those engaged in actual service, by authority of the late emperor Augustus, and of Nerva also, and further by that of the excellent emperor Trajan: but afterwards by a subscription² of the late emperor Hadrian, it was extended to those who had been discharged as well, *i. e.* to veterans. Therefore, if they have made a testament as to their *castrense peculium*, it will devolve on the person whom they have appointed their heir. But if they have died intestate, leaving behind them no children or

¹ Οὐ δὲ γὰρ ἰδιώτου γνώμην ἰσχυροτέραν εἶναι τῶν νόμων, sa. s. Theophilus in reference to this restriction.

² A *subscription* is an indorsement

upon a petition or letter of inquiry; a somewhat irregular method of record, but not uncommon with certain of the Emperors.

liberis vel fratribus superstitibus, ad parentes eorum iure uni pertinebit¹. ex hoc intellegere possumus, quod in adquisierit miles qui in potestate patris est neque ipsum ad adimere posse, neque patris creditores id vendere vel inquietare, neque patre mortuo cum fratribus commune sed scilicet proprium eius esse id quod in castris acquisivamquam iure civili omnium qui in potestate parentum peculia perinde in bonis parentum computantur, acsi um peculia in bonis dominorum numerantur: exceptis et his quae ex sacris constitutionibus et praecipue ; propter diversas causas non acquiruntur. Praeter hos qui castrense peculium vel quasi castrense habent, si alius filiusfamilias testamentum fecerit, inutile est, licet potestatis factus decesserit².

ers, it will belong to their parents in accordance with the ry rules¹. Hence we may gather that the acquisitions in camp by a soldier who is under *patria potestas* cannot ken away by the father himself, nor sold or otherwise red with by the father's creditors, nor shared by the r's brothers upon the death of the father, but are absohis own; although by the civil law the *peculia* of all is under their parents' *potestas* are reckoned a part of parents' property, just as the *peculia* of slaves are esteemed masters' property; those goods only being excepted, which ling to constitutions made by various emperors, and espeby ourselves, are for different reasons not to be acquired. any other *filiusfamilias*, not being the possessor of *pecuastrense* or *quasi-castrense*, make a testament, it is invalid, hough he die after becoming *sui juris*².

the death of a *filiusfamilias* *ulium profectilium* was reby the ascendant; but as to *ulium adventitium*, the order ession was (1) children, (2) s and sisters, (3) ascendants. 11. 3 and 4. *Peculium cas* evolved as *peculium adventi*ossibly by customary law; rate the enactment, if there

were one, which settled the rule, is lost. *Jure communi*=*jure peculii*, i. e. it reverts as a *peculium*, not as an inheritance.

² This is an application of Cato's rule: "quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere." D. 34. 7. 1. pr.

1. Praeterea testamentum facere non possunt impuberes, quia nullum eorum animi iudicium est; item furiosi, quia mente carent. nec ad rem pertinet, si impubes postea pubes factus, aut furiosus postea compos mentis factus fuerit et decesserit. furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, iure testati esse videntur; certe eo quod ante furorem fecerint testamento valente: nam neque testamenta recte facta neque aliud ullum negotium recte gestum postea furor interveniens perimit. (2.) Item prodigus cui bonorum suorum administratio interdicta est testamentum facere non potest, sed id quod ante fecerit quam interdictio ei bonorum fiat, ratum est. (3.) Item mutus et surdus non semper testamentum facere possunt. (utique autem de eo surdo loquimur qui omnino non exaudit, non qui tarde exaudit: nam et mutus is intellegitur qui eloqui nihil potest, non qui tarde loquitur.) saepe etiam literati et eruditi homines variis casibus et audiendi et loquendi facultatem amittunt: unde nostra constitutio etiam his subvenit, ut certis casibus et modis

1. Persons under puberty are also unable to make a testament, because they have no mental discretion: madmen also, because they are destitute of sense. Nor does it make any difference, supposing the person under puberty shall arrive at puberty, or the madman subsequently become sane, and then die. But if madmen make a testament at a time when there is an intermission of their lunacy, they are considered duly testate: and of course a testament made before they became mad is valid, for madness occurring subsequently does not make void either testaments duly executed or any other transaction duly completed. 2. A prodigal who has been interdicted from the management of his affairs, is another instance of a person unable to make a testament; but a testament which he made before the interdict was issued is valid. 3. A dumb or a deaf person cannot in all cases make a testament:—but of course by deaf we mean one who cannot hear at all, not one who hears with difficulty: as by dumb too is intended one who can say nothing, not one who speaks with difficulty. And as it frequently happens that well-read and learned men through various mishaps lose their faculty of hearing and speech, therefore a constitution of ours comes to their assistance, so

secundum normam eius possint testari, aliaque facere quae eis permissa sunt¹. sed si quis post testamentum factum valetudine aut quolibet alio casu mutus aut surdus esse coeperit, ratum nihilominus eius permanet testamentum. (4.) Caecus autem non potest facere testamentum, nisi per observationem quam lex divi Iustini, patris mei, introduxit². (5.) Eius qui apud hostes est testamentum quod ibi fecit non valet, quamvis redierit: sed quod dum in civitate fuerat fecit, sive redierit, valet iure postliminii, sive illic decesserit, valet ex lege Cornelia³.

TIT. XIII. DE EXHEREDATIONE LIBERORUM.

Non tamen, ut omnimodo valeat testamentum, sufficit haec observatio quam supra exposuimus. Sed qui filium in potestate habet curare debet, ut eum heredem instituat, vel exheredem nominatim faciat. alioquin si eum silentio praeterierit,

that in certain cases and by certain methods, in accordance with the provisions thereof, they can make a testament, and do other acts which are permitted to them¹. But if any one after having made a testament become dumb or deaf through ill-health or any other mischance, his testament still remains valid. 4. A blind man again cannot make a testament except in the form introduced by a law of my father Justin². 5. The testament which a prisoner taken by the enemy has made in the country of the enemy is invalid, even though he return; but one which he made whilst resident in his own state is valid by the rule of postliminy if he return; and by virtue of the Lex Cornelia, if he die there³.

TIT. XIII. ON THE DISINHERITING OF CHILDREN.

The formalities which we have explained above are not, however, sufficient to make a testament perfectly valid. But he who has a son under his *potestas* must take care either to appoint him heir or to disinherit him by name. Otherwise, if

¹ The construction referred to is C. 6. 22. 10, which permits a person who becomes deaf or dumb by disease to make a testament, provided he writes the whole of it with his own hand.

² C. 6. 22. 8. The testament was to be drawn up by a public notary

(*tabularius*) and read aloud in the presence of the testator and the seven witnesses.

³ D. 49. 15, 22, C. 8. 51. 9. By some writers it is supposed that this Lex Cornelia is the Lex Cornelia de falsis, B.C. 68; but this is by no means certain.

inutiliter testabitur¹, adeo quidem, ut etsi vivo patre filius mortuus sit, nemo heres ex eo testamento existere possit, quia scilicet ab initio non constiterit testamentum². Sed non ita de filiabus, vel aliis per virilem sexum descendantibus liberis utriusque sexus fuerat antiquitati observatum: sed si non fuerant heredes scripti scriptaeve, vel exheredati exheredataeve, testamentum quidem non infirmabatur, ius autem accrescendi eis ad certam portionem praestabatur³. sed nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere⁴.

1. nominatim autem exheredari quis videtur, sive ita exheredetur: Titius filius meus exheres esto, sive ita: filius meus exheres esto, non adiecto proprio nomine, scilicet si alius filius non extet. Postumi quoque liberi vel heredes institui debent vel exheredari. et in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis, sive feminini

he pass him over in silence, the testament will be void¹: so that even if the son die in the lifetime of his father, no one can be heir under such testament, for the plain reason that the testament was invalid from the very beginning². But the ancient rule was not the same as to daughters, or as to other descendants of either sex tracing through the male line: but supposing such were not appointed heirs or disinherited, the testament was not invalidated, but a right of attaching themselves for a specified portion was allowed to them³. Neither were the parents obliged to disinherit these persons by name, but it was allowable to do so in a general clause⁴.

1. A man is considered to be disinherited by name, if he be either disinherited in these words: "Titius, my son, be disinherited," or in these: "my son be disinherited," without the addition of his proper name, supposing, that is, there be no other son. After-born descendants also must be either appointed or disinherited. And in this respect the condition of all of them is the same, viz. that when an after-born son or any

¹ This point was not settled in Cicero's time; see *de Oratore*, 38.

² Gaius II. 115, 123, 124.

³ The portion was one half, if strangers had been instituted heirs; and a proportionate share, *pars viri-*

lis, when the written heirs were *sui heredes*. Ulp. XXII. 17, Gaius II. 124.

⁴ By the clause, added after specification of the heirs, "ceteri omnes exheredes sunt."

sexus sive masculini, praeterito, valet quidem testamentum, sed postea agnatione¹ postumi sive postumae rumpitur, et ea ratione totum infirmatur²: ideoque si mulier ex qua postumus aut postuma sperabatur abortum fecerit, nihil impedimento est scriptis heredibus ad hereditatem adeundam. sed feminini quidem sexus personae vel nominatim, vel inter ceteros exheredari solebant. dum tamen si inter ceteros exheredentur, aliquid eis legetur, ne videantur per oblivionem praeteritae esse: masculos vero postumos, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo: quicumque mihi filius genitus fuerit, exheres esto. (2.) Postumorum autem loco³ sunt et hi qui in sui heredis locum succedendo quasi agnascendo fiunt parentibus sui heredes. ut ecce si quis filium et ex eo nepotem neptemve in

other descendant, whether male or female, is passed over, the testament is still valid, but is broken by the subsequent *agnation*¹ of the after-born descendants, male or female, and thus becomes utterly inoperative². And therefore, if a woman, from whom an after-born son or daughter was expected, miscarry, there is nothing to prevent the appointed heirs from entering on the inheritance. After-born females may be disinherited either by name or in a general clause; provided only that if they be disinherited in a general clause, something be left them as a legacy, that they may not seem passed over through forgetfulness. But it has been ruled that after-born males, i.e. a son, &c., cannot be duly disinherited except they be disinherited by name, that is, in this manner, "Whatever son shall be born to me, let him be disinherited." 2. Those also are classed as after-born children³, who, by succeeding into the place of a *suus heres*, become heirs to their ascendants through *quasi-agnation*. For instance, if any man have under his *potes-*

¹ By *agnatio* is merely meant the fact of becoming an *agnatus*, which might be either by birth, or adoption, or, as in the present case, by conception; for where there is *conubium* the child follows his father's condition, and his rights vest at the time of conception. Therefore the testator passes over a *suus heres*, as

the child's rights extend back into the testator's lifetime.

² Ulp. xxiii. 3; Cic. *de Oratore*, i. 57, and *pro Caelio*. 25.

³ *Postumorum loco*, because the term *postumus* in strictness means one *born* after the making of his ascendant's testament.

potestate habeat, quia filius gradu praecedit, is solus iura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sint; sed si filius eius vivo eo moriatur, aut qualibet alia ratione exeat de potestate eius, incipit nepos neptisve in eius locum succedere, et eo modo iura suorum heredum quasi agnatione nanciscuntur. ne ergo eo modo rumpatur eius testamentum, sicut ipsum filium vel heredem instituere vel nominatim exheredare debet testator, ne non iure faciat testamentum, ita et nepotem neptemve ex filio necesse est ei vel heredem instituere vel exheredare, ne forte, vivo eo filio mortuo, succedendo in locum eius nepos neptisve quasi agnatione rumpant testamentum. idque lege Iunia Velleia¹ provisum est, in qua simul exheredationis modus ad similitudinem postumorum demonstratur.

3. Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. sed

tas a son and a grandson or granddaughter by him, the son alone has the rights of *suus heres*, because he is prior in degree, although the grandson and granddaughter by him are also under the same *potestas*: but if his son die in his lifetime, or depart from his *potestas* by any means, the grandson or granddaughter at once succeeds into his place, and so obtains the rights of a *suus heres* by quasi-agnation. Therefore, to prevent him or her from thus breaking the testament, it is necessary for a man to appoint as heir or disinherit the grandson or granddaughter by his son, just as he ought to appoint as heir or disinherit by name the son himself, to avoid making an informal testament: lest, perchance, if the son die in his lifetime, the grandson or granddaughter by succeeding into his place should break his testament by the quasi-agnation: and this is provided by the Lex Junia Velleia¹: wherein there is also drawn up a form of disinheriting similar to that for after-born descendants.

3. According to the civil law it is not necessary either to appoint as heirs or to disinherit emancipated children, because

¹ Passed A.D. 10, according to general opinion, though Schrader would assign it to A.D. 47. The Lex Junia Velleia insisted on disinheritance being *ad similitudinem postumorum*, i.e. males to be ex-

cluded by name, females either by name, or *inter ceteros* with a legacy, the latter proviso being to insure that they were not omitted through carelessness of the testator.

Praetor omnes, tam feminini sexus quam masculini, si heredes non instituantur, exheredari iubet, virilis sexus nominatim, feminini vero et inter ceteros. quodsi neque heredes instituti fuerint, neque ita, ut diximus, exheredati, promittit Praetor eis contra tabulas testamenti bonorum possessionem¹.

4. Adoptivi liberi, quamdiu sunt in potestate patris adoptivi, eiusdem iuris habentur cuius sunt iustis nuptiis quaesiti: itaque heredes instituendi vel exheredandi sunt, secundum ea quae de naturalibus exposuimus. emancipati vero a patre adoptivo neque iure civili, neque quod ad edictum Praetoris attinet, inter liberos numerantur. Qua ratione accidit, ut ex diverso, quod ad naturalem parentem attinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur, ut eos neque heredes instituere neque exheredare necesse sit. cum vero emancipati fuerint ab adoptivo patre, tunc incipiunt in ea causa esse in qua futuri essent, si ab ipso naturali patre emancipati fuissent.

they are not *sui heredes*. But the Praetor orders all, both males and females, to be disinherited, if they be not appointed heirs; males by name, but females either by name or in a general clause. And if they be neither instituted heirs nor disinherited in the manner we have specified, the Praetor promises them possession of the goods as against the testament¹.

4. Adopted children, so long as they are under the *potestas* of the adopting father, are considered to be under the same rule as those sprung from lawful marriage: and therefore they must be appointed heirs or disinherited, according to the principles we have laid down regarding actual children. But when emancipated by their adopting father, they are not accounted as children either by the civil law or by the Praetor's edict. According to this principle, when we look at the other side, the result is that so long as they are in the adoptive family, they are reckoned as strangers relatively to their actual parent; and hence there is no need for him either to appoint them heirs or to disinherit them. But supposing they are emancipated by the adopting father, they begin thereupon to be in the position in which they would have been if emancipated by the natural father himself.

¹ Originally the Praetor granted them possession of the whole, but

Antoninus allowed them to take half only; see Gaius II. 125, 126.

5. Sed haec quidem vetustas introducebat. nostra vero constitutio¹ inter masculos et feminas in hoc iure nihil interesse existimans, quia utraque persona in hominum procreatione similiter naturae officio fungitur, et lege antiqua duodecim tabularum omnes similiter ad successiones ab intestato vocabantur, quod et Praetores postea secuti esse videntur, ideo simplex ac simile ius et in filiis et in filiabus et in ceteris descendantium per virilem sexum personis, non solum natis, sed etiam postumis, introduxit, ut omnes, sive sui sive emancipati sunt, aut heredes instituantur aut nominatim exheredentur, et eundem habeant effectum circa testamenta parentum suorum infirmanda et hereditatem auferendam, quem filii sui vel emancipati habent, sive iam nati sunt sive adhuc² in utero constituti postea nati sunt. circa adoptivos autem filios certam induximus divisionem quae constitutione nostra, quam super adoptivis tulimus, continetur³. (6.) Sed si in expeditione occupatus miles testamentum faciat, et liberos suos iam natos vel postumos

5. These, however, were the rules introduced by the ancients: whereas one of our constitutions¹, maintaining that there ought to be no difference in this matter of right between males and females, since each sex fulfils equally its natural part in the procreation of mankind, and since by an ancient law of the Twelve Tables all were called alike to the succession on an intestacy, (a principle which the Praetors seem at a later period to have adopted,) has introduced a simple and uniform rule both for sons and daughters and other descendants through the male line, whether born at the time or after-born, namely, that all, whether they be *sui heredes* or emancipated, must either be appointed heirs or disinherited by name; and (if omitted) shall have the same effect as to invalidating the testaments of their ascendants and defeating the inheritance, which sons have, whether *sui heredes* or emancipated, and whether already born or conceived at the time² and born afterwards. As to adopted children, however, we have introduced a distinction, which is contained in that constitution of ours which we have enacted on the subject of the adopted³. 6. But if a soldier on active service make a testament and fail to disinherit by name

¹ C. 6. 28. 4.

² Sc. at the time when the testa-

ment was executed.

³ C. 8. 48. 10. See I. 11. 2.

nominatim non exheredaverit, sed silentio praeterierit, non ignorans an habeat liberos, silentium eius pro exheredatione nominatim facta valere constitutionibus Principum cautum est¹. (7.) Mater vel avus maternus necesse non habent liberos suos aut heredes instituere aut exheredare, sed possunt eos omittere. nam silentium matris aut avi materni ceterorumque per matrem ascendentium tantum facit, quantum exheredatio patris. neque enim matri filium filiamve, neque avo materno nepotem neptemve ex filia, si eum eamve heredem non instituat, exheredare necesse est, sive de iure civili quaeramus, sive de edicto Praetoris quo praeteritis liberis contra tabulas bonorum possessionem promittit². sed aliud eis adminiculum servatur, quod paulo post vobis manifestum fiet³.

TIT. XIV. DE HEREDIBUS INSTITUENDIS.

Heredes instituere permissum est tam liberos homines quam

his children then born or after-born, merely passing them over in silence, though not ignorant whether or not he has any, it is provided by constitutions of the emperors¹ that his silence shall be equivalent to a disinheriting expressly made. 7. A mother or maternal grandfather is under no necessity of instituting or disinheriting children, but may omit all mention of them. For the silence of a mother, or maternal grandfather or other ascendants on the mother's side is as effective as the disinheriting by a father. Because a mother is not obliged to disinherit a son or daughter, in case she do not appoint them heirs; neither is a maternal grandfather bound so to act towards a grandson or granddaughter by his daughter; whether we look at the civil law, or the edict of the Praetor in which he promises to omitted descendants possession of the goods as against the testament². But another remedy is provided for them, which will be explained to you a little further on³.

TIT. XIV. ON THE APPOINTMENT OF HEIRS.

It is allowable to appoint as heirs either freemen or slaves,

¹ C. 6. 21. 9 and 16. See also D. 29. 1. 36. 2; D. 29. 1. 33.

² Gaius III. 71.

³ The reference is to the *querela inofficiosi testamenti*, for which see II. 18, and App. E.

servos, et tam proprios quam alienos. Proprios autem olim quidem secundum plurimum sententias non aliter quam cum libertate recte instituere licebat. hodie vero etiam sine libertate ex nostra constitutione¹ heredes eos instituere permissum est. quod non per innovationem induximus, sed quoniam et æquius erat, et Atilicino placuisse Paulus suis libris, quos tam ad Masurium Sabinum quam ad Plantium scripsit, refert. Proprius autem servus etiam is intellegitur in quo nudam proprietatem testator habet, alio usumfructum habente². est autem casus in quo nec cum libertate utiliter servus a domina heres instituitur, ut constitutione divorum Severi et Antonini cavetur, cuius verba hæc sunt: servum adulterio maculatum non iure testamento manumissum ante sententiam ab ea muliere videri, quæ rea fuerat eiusdem criminis postulata, rationis est; quare sequitur, ut in eundem a domina collata institutio nullius momenti

and either your own slaves or those of other people. But formerly, according to the general opinion of lawyers, you could not duly appoint your own otherwise than with a gift of liberty. But now, according to our constitution¹, it is allowed you to appoint them heirs even without a gift of liberty. And this rule we have not introduced as an innovation, but because it was equitable, and because Paulus, in the Commentaries which he wrote upon Masurius Sabinus and Plautius, states that it was approved of by Atilicinus. "A slave of your own" is held to include one in whom the testator has the bare ownership, another having the usufruct². But there is a case in which a slave is not validly appointed heir by his mistress even with a gift of liberty, according to the exception in a constitution of the late emperors Severus and Antoninus, worded thus: "It is accordant with reason that a slave guilty of adultery shall not be held lawfully manumitted by his mistress, when she has been put on trial on the same charge and frees him before sentence is pronounced: therefore it is a consequence that an appointment (as heir) conferred on him by the mistress is to be held of no

¹ C. 6. 27. 5.

² C. 7. 15. 1. In olden times it was otherwise; for the manumitted person was a *servus sine domino*.

Ulpian l. 19. According to Justinian's legislation he was free, though compelled to serve the usufructuary for the appointed time.

habeatur¹. Alienus servus etiam is intellegitur in quo usumfructum testator habet.

1. Servus autem a domino suo heres institutus, si quidem in eadem causa manserit, fit ex testamento liber heresque necessarius². si vero a vivo testatore manumissus fuerit, suo arbitrio adire hereditatem potest, quia non fit necessarius, cum utrumque³ ex domini testamento non consequitur. quodsi alienatus fuerit, iussu novi domini adire hereditatem debet, et ea ratione per eum dominus fit heres: nam ipse alienatus neque liber neque heres esse potest, etiamsi cum libertate heres institutus fuerit: destitisse etenim a libertatis datione videtur dominus qui eum alienavit⁴. Alienus quoque servus heres institutus, si in eadem causa duraverit, iussu eius domini

account¹." The "slave of another" is understood to include one of whom the testator has the usufruct.

1. A slave appointed heir by his master, if he remain in the same condition, becomes in accordance with the testament free and necessary heir². But if he be manumitted by the testator in his lifetime, he can enter on the inheritance at his own pleasure, because he does not become a necessary heir, inasmuch as he does not get both things³ from the testament of his master. But if he have been alienated, he ought to enter on the inheritance at the command of his new master, and by such means the master becomes heir through him: for the alienated man himself cannot be either free or heir, even though he were appointed heir with a gift of freedom: because the master by alienating him is considered to have retracted the gift of freedom⁴. When another man's slave is instituted heir, if he remain in the same condition, he must enter on the inheritance

¹ The law is not preserved; but the doctrine is stated in D. 40. 9. 12. 6. The slave was a *statuliber*, i. e. free on condition of the acquittal of his mistress.

² II. 19. 1.

³ Sc. freedom and the inheritance.

⁴ The due appointment of an heir is the foundation of the whole testament; and, therefore, if the appointment be invalid, the testament fails utterly; though if a legacy alone

fail, the residue of the testament stands good. The appointment of the slave as heir, in the present case, is valid; but for judicial reasons his inheritance is for the benefit of another; whilst the gift of liberty is regarded as a legacy, and therefore the impossibility of its being received is, by the above principle, a matter of minor importance, not at any rate causing the inheritance to fall through.

adire hereditatem debet. si vero alienatus ab eo fuerit, aut vivo testatore aut post mortem eius antequam adeat, debet iussu novi domini adire. at si manumissus est vivo testatore, vel mortuo antequam adeat, suo arbitrio adire hereditatem potest.

2. Servus alienus post domini mortem recte heres instituitur, quia et cum hereditariis servis est testamenti factio¹: nondum enim adita hereditas personae vicem sustinet, non heredis futuri, sed defuncti, cum et eius qui in utero est servus recte heres instituitur. (3.) Servus plurium cum quibus testamenti factio est ab extraneo institutus heres, unicuique dominorum cuius iussu adierit pro portione domini acquirit hereditatem.

by command of his master: but if he be alienated by him, either in the testator's lifetime, or after his death and before he has entered, he must enter by command of his new master. But if he be manumitted in the lifetime of the testator, or after his death but before he enters, he can enter on the inheritance at his own pleasure.

2. The slave of another may be lawfully appointed heir after his master's death, because there is *testamenti factio*¹ even with slaves belonging to an inheritance; for whilst the inheritance has not yet been entered upon it represents the person, not of the future heir, but of the deceased; insomuch that even the slave of a child yet in the womb can be lawfully appointed heir. 3. When a slave belonging to several persons with whom there is *testamenti factio* is appointed heir by a stranger, he acquires the inheritance for the benefit of each of the masters by whose command he entered, according to their portion of ownership in him.

¹ See note on II. 10. 6. It seems plain enough that this passage refers to the case of a slave being appointed whilst his master is living, and becoming heir by the testator dying shortly after the slave's master, and whilst the inheritance of the latter is still unclaimed. But some commentators think that Justinian is dealing with the case of an appointment worded "the slave is to be-

come heir as soon as his master dies." Whether we take this eccentric hypothesis, or the other and more obvious one, the rule is plainly stated that an inheritance, prior to entry of the heir, represents the dead man; and so the only question to be asked is whether the testator had *testamenti factio* with him, in which case the slave is lawfully heir.

4. Et unum hominem, et plures in infinitum quot quis velit, heredes facere licet. (5.) Hereditas plerumque dividitur in duodecim uncias, quae assis appellatione continetur. habent autem et hae partes propria nomina ab uncia usque ad assem, ut puta haec: sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx, as. Non autem utique duodecim uncias esse oportet. nam tot unciae assem efficiunt quot testator voluerit, et si unum tantum quis ex semisse verbi gratia heredem scripserit, totus as in semisse erit: neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles, cuius sola voluntas in testando spectatur. et e contrario potest quis in quantascumque voluerit plurimas uncias suam hereditatem dividere. (6.) Si plures instituantur, ita demum partium distributio necessaria est, si nolit testator eos aequis ex partibus heredes esse: satis enim constat, nullis partibus nominatis, ex aequis partibus eos heredes esse. Partibus autem in quorundam personis expressis, si quis alius sine parte nominatus erit, si quidem aliqua pars assi deerit, ex ea

4. A man may appoint as heir either one person or several, as many as he pleases, without any limitation. 5. An inheritance is generally divided into twelve *unciae*, which are comprehended under the appellation, an *as*. And these portions have their special names from the *uncia* up to the *as*, thus; *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes*, *dodrans*, *dextans*, *deunx*, *as*. But it is not absolutely necessary that there be twelve *unciae*, for that number of *unciae* constitute the *as* which the testator pleases: and if, for instance, a man make one person only his heir to a *semis*, the whole *as* will be comprised in the *semis*: for the same man cannot die partly testate and partly intestate, unless he be a soldier; whose intention when he made his testament is alone regarded. And in the contrary case a man may divide his inheritance into as many parts in excess (of twelve) as he pleases. 6. If several heirs be appointed, a specification of their portions is only needful when the testator does not wish them to be heirs to equal shares: for it is fully established that when no portions are named they are heirs to equal portions. But when the portions are stated as regards some of them, and another person is nominated without his share being expressed, then, if

parte heres fiet; et si plures sine parte scripti sunt, omnes in eandem partem concurrent. si vero totus *as* completus sit, in partem dimidiam vocantur, et ille vel illi omnes in alteram dimidiam. nec interest, primus, an medius, an novissimus sine parte scriptus sit: ea enim pars data intellegitur quae vacat. (7.) Videamus, si pars aliqua vacet, nec tamen quam sine parte heres institutus sit, quid iuris sit? veluti si tres ex quartis partibus heredes scripti sunt. et constat vacantem partem singulis tacite pro hereditaria parte accedere, et perinde haberi ac si ex tertiis partibus heredes scripti essent; et ex diverso si plures in portionibus sint, tacite singulis decrescere, ut si verbi gratia quatuor ex tertiis partibus heredes scripti sunt, perinde habeantur ac si unusquisque ex quarta parte scriptus fuisset. (8.) Et si plures unciae quam duodecim distributae sunt, is qui sine parte institutus sit quod dupondio deest habebit: idemque erit, si dupondius expletus sit. quae omnes partes ad assem postea revocantur, quamvis sint plurium unciarum.

any fraction of the *as* be unappropriated, he will become heir to that fraction: and if several be appointed without specified shares, they will all be conjoined as to that fraction. But if the whole *as* have been fully devised, they are called to participation in a half, and the person or persons (with specified shares) to participation in the other half: nor is it material whether the heir without portion be appointed first, or immediately or last: for that part is considered assigned to him which is ownerless. 7. Supposing any part to be unappropriated, and no heir appointed without specified share, let us consider what is the rule; for instance, if three be appointed heirs to a fourth each? It is admitted that the unappointed portion accrues by implication to each according to his share in the inheritance, and that the case is to be held the same as if they were appointed heirs to a third each: and in the opposite case, if there be too many for the shares given, there is by implication a deduction from each; for instance, if four be appointed heirs to a third each, they are to be treated as if each had been appointed to a fourth. 8. Also if more *unciae* than twelve be assigned, the heir appointed without a share will take the deficiency from a double *as*: and the same principle holds if the double *as* be fully distributed. But all these

9. Heres et pure et sub condicione¹ institui potest. Ex certo tempore² aut ad certum tempus³ non potest, veluti post quinquennium quam moriar, vel ex calendis illis, aut usque ad calendas illas heres esto. denique adiectum pro supervacuo haberi placet, et perinde esse ac si pure heres institutus esset. (10.) Impossibilis condicio in institutionibus et legatis, nec non in fideicommissis et libertatibus, pro non scripto habetur. (11.) Si plures condiciones institutioni ad-

parts are in the end reduced to the *as*, though they comprise more than the proper number of *unciae*.

9. An heir may be instituted either absolutely or under condition¹, but not from a certain time² or to a certain time³, for instance "after five years from my death" or "from such kalends" or "to such kalends let a person be my heir." In fact it is ruled that the date so inserted ought to be treated as superfluous, and that the case is as if the heir had been appointed absolutely. 10. An impossible condition in appointments and legacies, as well as in trusts and gifts of freedom, is treated as not inserted. 11. When several conditions are attached to an appointment, then if they be put conjointly,

¹ When an heir is appointed conditionally, the condition may be either *suspensive* or *resolutive*: i. e. either to the effect that the inheritance is not to be his till something occurs, or that the inheritance is to be his at once, but to be taken away again on a certain event. A condition of the latter kind is illegal, and the appointment is treated as though it were an absolute one: for as stated in D. 4. 4. 7. 10, "sine dubio heres manebit, qui semel extitit."

A *suspensive* condition may vest or come to pass in the testator's lifetime, in which case the appointment of the heir becomes absolute, and he can enter into possession immediately on the testator's death. But if on the latter event occurring the condition has not yet vested, the question arises what is to be done with the inheritance. It cannot be allowed that the heir on

intestacy should occupy it; for then according to the principle of "*semel heres, semper heres*" (D. 4. 4. 7. 10, already quoted, D. 28. 5. 88, &c.), he could not be ejected on the vesting of the contingency. The inheritance therefore is vacant (*jacet*) till the event is known; and then, according as the condition comes to pass or not, the appointed heir or the heir on intestacy enters and takes all intermediate fruits and profits which have accrued. If creditors would suffer by the delay, the Praetor allows them to have an interim possession and sell enough to satisfy their claims. D. 28. 5. 23.

² As he must be heir eventually the Praetor grants him immediate possession of the property. D. 28. 5. 23. pr.

³ He enters at once, and can never be dispossessed; *semel heres, semper heres*.

scriptae sunt, si quidem coniunctim, ut puta si illud et illud factum fuerit, omnibus parendum est; si separatim, veluti si illud aut illud factum fuerit, cuilibet obtemperare satis est.

12. Hi quos numquam testator vidit heredes institui possunt. veluti si fratris filios peregrinatos, ignorans qui essent, heredes instituerit: ignorantia enim testantis inutilem institutionem non facit¹.

TIT. XV. DE VULGARI SUBSTITUTIONE.

Potest autem quis in testamento suo plures gradus heredum facere, ut puta, si ille heres non erit, ille heres esto; et deinceps in quantum velit testator substituere potest, et novissimo loco in subsidium vel servum necessarium heredem instituere². (1.) Et plures in unius locum possunt substitui, vel unus in plurium, vel singuli singulis; vel invicem qui heredes instituti sunt³.

as for instance, "if this thing and that thing come to pass," all must be complied with: if separately, as for instance "if this thing or that thing come to pass," it is enough to comply with any one of them.

12. Those whom a testator has never seen may be appointed heirs by him, for instance if he appoint as heirs his brother's sons born abroad, not knowing who they are; for ignorance on the testator's part does not make void the appointment¹.

TIT. XV. ON VULGAR SUBSTITUTION.

A man may in his testament appoint several degrees of heirs, for instance thus, "if such or such person will not be my heir, let such or such other be heir:" and so a testator can successively appoint to any extent he pleases, and ultimately, as a last safeguard, appoint a slave to be "necessary" heir². 1. Several persons can be substituted in the place of one, or one in the place of several, or one to each one, or the instituted heirs reciprocally each to the other³.

¹ Gaius II. 238; C. 6. 24. 11.

² II. 19. 1.

³ Gaius II. 174, 175.

2. Et si ex disparibus partibus heredes scriptos invicem substituerit, et nullam mentionem in substitutione habuerit partium, eas videtur partes in substitutione dedisse quas in institutione expressit: et ita divus Pius rescripsit¹. (3.) Sed si instituto heredi, et coheredi suo substituto dato, alius substitutus fuerit, divi Severus et Antoninus, sine distinctione, rescripserunt, ad utramque partem substitutum admitti². (4.) Si servum alienum quis patremfamilias arbitratus heredem scripserit, et si heres non esset, Maevium ei substituerit, isque servus iussu domini adierit hereditatem: Maevius in partem admittitur. illa enim verba si heres non erit, in eo quidem quem alieno iuri subiectum esse testator scit, sic accipiuntur:

2. And if a man substitute reciprocally heirs who have been instituted with unequal shares, and in the substitution make no mention of their shares, he is considered to have given in the substitution the same shares which he stated in the institution: and so the late emperor Pius decided in a rescript¹. 3. Also if a third person be substituted to an instituted heir who was made the substitute to his coheir, the late emperors Severus and Antoninus issued a rescript "that the substituted person should be admitted to both portions alike²." 4. If any one appoint as his heir the slave of another person, imagining that he is *sui juris*, and then substitute Maevius to him, in case he should not become heir; and if such slave enter on the inheritance at the command of his master; Maevius is allowed to take half. For the words "if he shall not become heir" are interpreted thus in the case of a person whom the testator knows to be subject to the power of another: "if he neither

¹ C. 6. 26. 1. But the superscription in the Code assigns the rescript to M. Antoninus, instead of T. Antoninus.

² The case is as follows: A and B are appointed heirs; B is substituted to A; and C to B.

If A die first, B becomes entitled to both shares; and if he then die or refuse the inheritance, C takes everything. If B die first, C of course is entitled to B's share; but it is not so certain that he ought to

have A's share also, if A die or refuse subsequently to B's death. It might in fact be argued that he was substituted to B, and therefore could only succeed to B's vested rights; which on this second hypothesis never included A's share, though it did on the first. The question, however, was settled in favour of C's succeeding to all rights of B, whether vested or contingent. D. 28. 6. 27; D. 28. 6. 41. pr.

si neque ipse heres erit, neque alium heredem effecerit; in eo vero quem patremfamilias arbitratur, illud significant: si hereditatem sibi, eive cuius iuri postea subiectus esse coeperit, non acquisierit. idque Tiberius Caesar in persona Parthenii servi sui constituit¹.

TIT. XVI. DE PUPILLARI SUBSTITUTIONE.

Liberis suis impuberibus quos in potestate quis habet non solum ita, ut supra diximus, substituere potest, id est ut si heredes ei non extiterint, alius ei sit heres; sed eo amplius, ut et si heredes ei extiterint et adhuc impuberes mortui fuerint, sit eis aliquis heres². veluti si quis dicat hoc modo:

become heir himself nor cause another to become heir;" whilst in the case of one whom he takes to be *sui iuris* they have this meaning: "if he do not acquire the inheritance for himself, nor for any one to whose power he afterwards becomes subject:" and thus it was decided by Tiberius Caesar in the case of his slave Parthenius¹.

TIT. XVI. ON PUPILLAR SUBSTITUTION.

A person can substitute to his descendants under the age of puberty whom he has subject to his *potestas* not only in the way we have named above, i. e. that if they do not become his heirs, some one else may be *his* heir: but further than this, so that even if they do become his heirs, and die whilst still under puberty, some one else shall be *their* heir²; for example

¹ D. 28, 5. 41. See also D. 28. 5. 40. The latter part of the present paragraph states the rules to be observed when the testator acts on an opinion accordant with facts. But the case specially submitted to us at the beginning of it is one where the testator's opinion is at variance with the facts; he supposes the slave to be free and therefore appoints him heir, substituting to meet the case of his declining the inheritance, as a free man could do without consulting any person. What is to be done, therefore, when the heir turns out to be a slave? We must consider what the testator would have done, if

he had known the status of his nominee. If it can be proved that he would have appointed him all the same, even had he known what he was, then of course the slave's master has a right to the inheritance. If it can be proved he would not have appointed him, had he been aware he was a slave, then the substitute is to be preferred; see C. 6. 24. 3. If nothing can be established as to the testator's possible behaviour, the equities are equal, and the slave's master and the substitute must divide the property.

² Cicero speaks of the substitute in the latter case as being heir to the

Titius filius meus mihi heres esto. si filius meus mihi heres non erit, sive heres erit et prius moriatur quam in suam tutelam venerit (id est pubes factus sit), tunc Seius heres esto. quo casu siquidem non extiterit heres filius, tunc substitutus patri fit heres; si vero extiterit heres filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. Nam moribus institutum est, ut, cum eius aetatis sunt in qua ipsi sibi testamentum facere non possunt, parentes eis faciant¹. (1.) Qua ratione excitati etiam constitutionem in nostro posuimus codice, qua prospectum est, ut si mente captos habeant filios vel nepotes vel pronepotes cuiuscumque sexus vel gradus, liceat eis, etsi puberes sint, ad exemplum pupillaris substitutionis certas personas² substituere. sin autem resipuerint, eandem substitutionem infirmari, et hoc ad exemplum pupillaris substitutionis quae, postquam pupillus adoleverit, infirmatur. (2.) Igitur in pupillari substitutione secundum praefatum modum ordinata duo quodammodo sunt

when any one uses these words: "Titius, my son, be my heir. If my son shall not become my heir, or if he become my heir and die before he comes into his own tutelage (i.e. before he is of puberty), then Seius be heir." In which case, if the son do not become heir, the substitute becomes heir to the father: but if the son become heir and die before puberty, the substitute becomes heir to the son himself. For it has become established by custom that when persons are of such age as to be unable to make a testament for themselves, their ascendants shall make one for them¹. 1. And swayed by this principle we have introduced a constitution into our code, in which it is provided that if any persons have children, grandchildren or great grandchildren, of any sex or age, deficient in intellect, they may, on the analogy of pupillar substitution, substitute certain persons to them², even though they be of puberty. But if they recover their reason, this substitution becomes void; and this incident too is in accordance with the analogy of a

father: see Cic. *de Oratore*, II. 32; *de Invent.* II. 21.

¹ D. 28. 6. 2.

² C. 6. 26. 9. If the imbecile person had children, one or more of these must be substituted to him:

if he had no children, but brothers or sisters, some of these must be nominated: failing both the aforementioned classes the testator could appoint whomsoever he pleased.

testamenta, alterum patris, alterum filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum est testamentum duarum causarum, id est duarum hereditatum.

3. Sin autem quis ita formidolosus sit, ut timeret, ne filius eius pupillus adhuc, ex eo quod palam substitutum accepit, post obitum eius periculo insidiarum subiiceretur: vulgarem quidem substitutionem palam facere et in primis testamenti partibus debet; illam autem substitutionem per quam, etsi heres extiterit pupillus et intra pubertatem decesserit, substitutus vocatur, separatim in inferioribus partibus scribere, eamque partem proprio lino propriaque cera consignare, et in priore parte testamenti cavere, ne inferiores tabulae vivo filio et adhuc impubere aperiantur¹. illud palam est non ideo minus valere substitutionem impuberis filii, quod in hisdem tabulis scripta sit quibus sibi quisque heredem instituisset, quamvis hoc pupillo periculosum sit.

4. Non solum autem heredibus institutis impuberibus liberis

pupillar substitution, which is void as soon as the pupil arrives at adolescence. 2. Therefore in a pupillar substitution, made in the way just named, there are, so to speak, two testaments, one of the father, another of the son, as though the son had instituted an heir for himself: or at any rate there is one testament on two subjects, i.e. in reference to two inheritances.

3. But if any one be so apprehensive as to fear that his son, who is still under puberty, may be liable to danger of foul play from the fact of having another person openly substituted to him; he ought to make the vulgar substitution openly and in the earlier part of his testament, but write separately in the concluding portion the other substitution whereby the substitute is called to inherit in the case where the pupil becomes heir and dies within the age of puberty; and he should seal up that part with a separate string and seal, and insert a proviso in the earlier part of the testament that the concluding pages are not to be opened whilst the son is alive and still under puberty¹. It is, however, clear that a substitution made to a child under puberty is not less valid because of being written on the same pages wherein he is instituted heir by the testator, although it may be a source of danger to the pupil.

4. Ascendants can not only substitute to those descendants

¹ Gaius II. 181.

ita substituere parentes possunt, ut et si heredes eis extiterint et ante pubertatem mortui fuerint, sit eis heres is quem ipsi voluerint, sed etiam exheredatis. itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum atque amicorum acquisitum fuerit, id omne ad substitutum pertineat. Quaecumque diximus de substitutione impuberum liberorum vel heredum institutorum vel exheredatorum, eadem etiam de postumis intellegimus.

5. Liberis autem suis testamentum facere nemo potest, nisi et sibi faciat¹: nam pupillare testamentum pars et sequela est paterni testamenti, adeo ut si patris testamentum non valeat, nec filii quidem valebit. (6.) Vel singulis autem liberis, vel qui eorum novissimus impubes morietur, substitui potest. singulis quidem, si neminem eorum intestato decedere voluerit; novissimo, si ius legitimarum hereditatum integrum inter eos custodiri velit. (7.) Substituatur autem impuberi aut

under puberty whom they have instituted their heirs, in such manner that if they become heirs and die under puberty he whom the ascendants choose shall be their heir; but can also substitute to disinherited descendants. In that case, therefore, if anything be acquired by the pupil from inheritances, or legacies or gifts of relations or friends, the whole of it belongs to the substitute. And all that we have said as to the substitution to descendants under puberty, whether instituted heirs or disinherited, we shall understand to apply also to after-born descendants.

5. No one, however, can make a testament for his descendants, unless he make one also for himself¹: for the pupillar testament is a part and corollary of the paternal testament, so much so that if the father's testament be invalid, the son's also will not stand. 6. The substitution may either be to each child separately, or to that one who shall die last under the age of puberty: to each separately, in case the ancestor wish none of them to die intestate; or to the last surviving, in case he desire that the right of statutory inheritance shall be maintained amongst them. 7. The substitution to a child under puberty

¹ Ulp. XXIII. 9. It was also essential that the child should be under *potestas*, whether the substitution were pupillar, i.e. to a child under

puberty (see above, *pr.*), or quasi-pupillar, i.e. to an imbecile descendant (see D. 28. 6. 2).

nominatim, veluti Titius; aut generaliter, ut quisquis mihi heres erit: quibus verbis vocantur ex substitutione, impubere filio mortuo, qui et ei scripti sunt heredes et extiterunt¹, et pro qua parte heredes facti sunt. (8.) Masculo igitur usque ad quatuordecim annos substitui potest, feminae usque ad duodecim annos. et si hoc tempus excesserit, substitutio evanescit.

9. Extraneo vero vel filio puberi heredi instituto ita substituere nemo potest, ut si heres extiterit et intra aliquod tempus decesserit, alius ei sit heres. sed hoc solum permissum est, ut eum per fideicommissum testator obliget alii hereditatem eius vel totam vel pro parte restituere; quod ius quale sit, suo loco trademus².

is either made by name, as, "let Titius succeed," or in general terms, as, "let each of my heirs succeed according to his interest:" by which latter form of wording those are called in as substitutes, on the death of the child under puberty, who have both been appointed and have become heirs to the father¹; and they succeed in proportion to the shares which they received in the father's inheritance. 8. Substitution, then, can be made to a male up to the age of fourteen years, to a female up to the age of twelve: but when these ages have been passed, the substitution becomes void.

9. If a stranger or a son above puberty be instituted heir, no one can substitute to him in such wise that if he become heir and die within some specified time, some other person shall be his heir: but it is only permissible for the testator to impose upon him a trust to deliver over the inheritance either wholly or in part to the other: the nature of which transaction we will explain in its proper place².

¹ The strict interpretation put upon this rule is shown by the example in D. 28. 6. 3. A testator had appointed two heirs, viz. his own son and the slave of a stranger: he had also made a pupillar substitution to his son in the general form "quisquis mihi heres erit, idem filio impuberi heres esto." Between the dates of the testator's death and that of his son, the latter dying subsequently under puberty, the slave had been sold or emancipated. It was ruled that although the stranger took

the portion to which the slave was directly appointed, he could not take the portion to which he was substituted; because though he had *become* heir in the first instance, he had not *done so through personal appointment*.

So too, if the appointed heir had taken the father's inheritance, but died before the son (to whom also he had been substituted), the heir of this heir could not succeed in the event of the son dying under puberty. D. 28. 6. 8. pr.

² 11. 23.

TIT. XVII. QUIBUS MODIS TESTAMENTA INFIRMANTUR.

Testamentum iure factum usque eo valet, donec rumpatur ritumve fiat. (1.) Rumpitur autem testamentum, cum in odem statu manente testatore ipsius testamenti ius vitatur. si quis enim post factum testamentum adoptaverit sibi filium per Imperatorem, eum qui sui iuris est, aut per Praetorem, secundum nostram constitutionem¹, eum qui in potestate parentis fuerit : testamentum eius rumpitur quasi agnatione sui heredis².

2. Posteriore quoque testamento, quod iure perfectum est, superius rumpitur. nec interest an extiterit aliquis heres ex eo, an non extiterit : hoc enim solum spectatur, an aliquo casu extere potuerit. ideoque si quis aut noluerit heres esse, aut vivo testatore, aut post mortem eius antequam hereditatem adiret, lecesserit, aut condicione sub qua heres institutus est defectus sit : in his casibus paterfamilias intestatus moritur : nam et

TIT. XVII. IN WHAT WAYS TESTAMENTS ARE INVALIDATED.

A testament duly executed stands good until it is broken or made ineffectual.

1. A testament is *broken* when its effect is destroyed without the testator's status being changed. For if any one after making a testament adopt a son, whether one who is *sui juris* by authority of the Emperor; or one under the *potestas* of his parent by authority of the Praetor, according to the method laid down in our constitution¹; his testament is broken by the quasi-agnation of a *suus heres*².

2. A testament of earlier date is also broken by one duly executed at a later period. And it makes no matter whether any one become heir under the second testament or not : for the only point regarded is whether an heir could have existed under any circumstances. Therefore, if the appointee refuse to be heir, or die in the lifetime of the testator, or after his death but before entering on the inheritance, or fail to fulfil some condition subject to which he was appointed heir; in these cases the *paterfamilias* dies intestate, for the earlier testament

¹ Sc. by *plena adoptio*, according to the provisions of C. 8. 48. 10. see I. 11. 2.

² II. 13. I. n.

prius testamentum non valet, ruptum a posteriore; et posterius aequè nullas vires habet, cum ex eo nemo heres existat¹. (3.) sed si quis priore testamento iure perfecto, posterius aequè iure fecerit, etiamsi ex certis rebus in eo heredem instituit, superius testamentum sublatum esse divi Severus et Antoninus rescipserunt². cuius constitutionis verba inseri iussimus, cum aliud quoque præterea in ea constitutione expressum est³. Imperatores Severus et Antoninus Coccio Campano. Testamentum secundo loco factum, licet in eo certarum rerum heres scriptus sit, iure valere perinde ac si rerum mentio facta non esset, sed teneri heredem

is void, being broken by the later one: and the later one is equally without force, since no one becomes heir under it¹. 3. But if any one after duly executing one testament, execute another in equally proper form, the late emperors Severus and Antoninus declared in a rescript that the first testament is made void, even though the testator in his second testament appointed an heir to specified articles only². We have ordered the words of this constitution to be quoted, because there is another point³ also expressed in it. "The emperors Severus and Antoninus to Coccinus Campanus. There can be no doubt that the second testament, although the heir is appointed therein to specified articles only, must stand good at law just as if there had been no such specification: but the heir so ap-

¹ Gains II. 144.

² The rule was that if two heirs were appointed in the same testament, one to a specific portion of the inheritance, the other to specific articles, the first-named heir was sole heir and the other a mere legatee. C. 6. 24. 13. But when only one person was named, and instituted heir to specific articles, the mention of the articles was considered surplusage, and the appointment treated as an absolute one to the entire inheritance. D. 28. 5. 1. 4, D. 28. 5. 9. 13. &c. &c.

If a second testament contained such an appointment, and at the same time confirmed a testament of earlier date; the heir to specific articles in the second testament was

treated as absolute heir, and the heir under the first testament became a *quasi-emancipatus*; so that the Pegasian quarter could be reserved by the former when he paid over the legacy to the latter. II. 23. 5.

It will be observed that the rescript in the text speaks of the reservation being *ex lege Falcidia*, whereas it really would be *ex senatusconsulto Pegasiano*; but the quarta Pegasiana is frequently called *quarta Falcidia* by the jurists, e.g. by Ulpian in II. 36. 1. 16. 9.

³ The "other point," of course, is that a direction in the second testament confirming the first is to be enforced.

scriptum, ut contentus rebus sibi datis, aut suppleta quarta ex lege Falcidia¹, hereditatem restituat his qui in priore testamento scripti fuerant, propter inserta verba secundo testamento, quibus ut valeret prius testamentum expressum est, dubitari non oportet. Et ruptum quidem testamentum hoc modo efficitur.

4. Alio quoque modo testamenta iure facta infirmantur, veluti cum is qui fecerit testamentum capite deminutus sit. quod quibus modis accidit, primo libro retulimus². (5.) Hoc autem casu irrita fieri testamenta dicuntur, cum alioquin et quae rumpantur irrita fiunt; et quae statim ab initio non iure fiunt irrita sunt, et ea quae iure facta sunt, postea propter capitis deminutionem irrita fiunt, possumus nihilominus rupta dicere. sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure facta dicuntur, quaedam iure facta rumpi, vel irrita fieri³.

6. Non tamen per omnia inutilia sunt ea testamenta, quae

pointed must be compelled to rest content with the property given him or with a fourth part made up to him in accordance with the Lex Falcidia¹, and must deliver over (the residue of) the inheritance to the persons named in the testament first made, because of the words inserted in the second testament and expressing that the first is to stand good." A testament, therefore, can be broken in this way.

4. Testaments duly executed are invalidated in another way also, viz. if the maker of a testament suffer *capitis deminutio*. In what ways this comes to pass we have stated in the preceding book². 5. But in this case we shall say that the testaments become *ineffectual*; although, on the other hand, those also become ineffectual which are broken; and those are ineffectual which are executed informally from the very beginning; and those too which have been duly executed, and afterwards become ineffectual through a *capitis deminutio*, we might just as well call broken. But as it is plainly more convenient to distinguish particular cases by particular names, therefore some are said to be executed informally, others to be broken after being formally executed, or to become ineffectual³.

6. Those testaments, however, are not altogether valueless,

¹ II. 22.

² I. 16.

³ See App. F.

ab initio iure facta propter capitis deminutionem irrita facta sunt. nam si septem testium signis signata sunt, potest scriptus heres secundum tabulas testamenti bonorum possessionem¹ agnoscere, si modo defunctus et civis Romanus et suae potestatis mortis tempore fuerit: nam si ideo irritum factum sit testamentum, quod civitatem vel etiam libertatem testator amisit, aut quia in adoptionem se dedit et mortis tempore in adoptivi patris potestate sit, non potest scriptus heres secundum tabulas bonorum possessionem petere.

7. Ex eo autem solo non potest infirmari testamentum, quod postea testator id noluit valere: usque adeo ut, et si quis post factum prius testamentum posterius facere coeperit, et aut mortalitate praeventus, aut quia eum eius rei poenituit, non perfecisset, divi Pertinacis oratione² cautum est, ne alias tabulae priores iure factae irritae fiant, nisi sequentes iure ordinatae et perfectae fuerint. nam imperfectum testamentum sine dubio nullum est. (8.) Eadem oratione expressit,

which have been duly executed originally and subsequently made ineffectual by a *capitis deminutio*. For if they be sealed with the seals of seven witnesses, the appointed heir can claim possession of the goods "in accordance with the testament¹," provided only the deceased was a Roman citizen and *sui iuris* at the time of his death: for if a testament become ineffectual because the testator after making it lost citizenship, or liberty as well, or because he gave himself in adoption and at the time of his death was under the *potestas* of his adoptive father, then the appointed heir cannot claim possession of the goods "in accordance with the testament."

7. A testament cannot be made invalid merely because the testator subsequently wished that it should not stand good: and this rule is so absolute, that even if the testator, who had made one testament, began to make another, and failed to complete it, either because he was cut off by death or because he repented of his intention, it was laid down in an address² of the late emperor Pertinax that the first document, if duly executed, should not become void unless the later one was drawn up in proper form and completed. For an incomplete

¹ III. 9. 3.

² An address which led to the

passing of a *senatusconsultum*, Capitol. Pertinax, 7.

non admissurum se hereditatem eius qui litis causa Principem heredem reliquerit¹, neque tabulas non legitime factas in quibus ipse ob eam causam heres institutus erat probaturum, neque ex nuda voce² heredis nomen admissurum, neque ex ulla scriptura cui iuris auctoritas desit aliquid adepturum. secundum haec divi quoque Severus et Antoninus saepissime rescripserunt: licet enim (inquiunt) legibus soluti sumus, attamen legibus vivimus.

TIT. XVIII. DE INOFFICIOSO TESTAMENTO.

Quia plerumque parentes sine causa liberos suos vel exheredant vel omittunt: inductum est³, ut de inofficioso testamento agere possint liberi, qui queruntur aut inique se exheredatos aut inique praeteritos, hoc colore quasi non sanae

testament is undoubtedly null and void. 8. In the same address he declared "that he would not accept an inheritance from one who made the emperor his heir on account of a law-suit¹: nor would he validate a document improperly executed in which he was made heir for the very purpose (of condoning the informality): nor would he accept the title of heir given to him by mere word of mouth²: nor take anything by virtue of a writing deficient in legal authority. And in harmony with these sentiments the late emperors Severus and Antoninus published a variety of rescripts: "for although," said they, "we are exempted from the laws, still we live in accordance with the laws."

TIT. XVIII. ON AN INOFFICIOUS TESTAMENT.

Since ascendants frequently disinherit or omit their descendants without reason, it has become usual³ that descendants who complain that they have been either unjustly disinherited or unjustly omitted, shall be allowed to bring the action called "de inofficioso testamento," on the hypothesis that those who

¹ The emperor could not be sued, being *legibus solutus*; so that if he had accepted the gift, the testator's opponent would have suffered a grievous wrong.

² See Sueton. *Calig.* 38; Sueton.

Dom. 12.

³ Probably no law was enacted on the subject but the custom sprung up "*ex disputatione fori.*" See Lovardus *de vera origine querelae inofficiosi.*

mentis fuerunt, cum testamentum ordinarent. sed hoc dicitur non quasi vere furiosus sit; sed recte quidem fecit testamentum, non autem ex officio pietatis: nam si vere furiosus est, nullum est testamentum. (1.) Non tantum autem liberis permissum est parentum testamentum inofficiosum accusare, verum etiam parentibus liberorum. soror autem et frater turpibus personis scriptis heredibus ex sacris constitutionibus praelati sunt¹: non ergo contra omnes heredes agere possunt. ultra fratres igitur et sorores cognati nullo modo aut agere possunt, aut agentes vincere. (2.) Tam autem naturales liberi, quam secundum nostrae constitutionis divisionem² adoptati, ita demum de inofficioso testamento agere possunt, si nullo alio iure ad bona defuncti venire possunt³. nam qui alio iure veniunt ad totam hereditatem vel partem eius, de inofficioso agere non possunt. Postumi quoque qui nullo alio

executed the testament were not of sound mind. But this allegation does not import that the testator was really insane: but that he made his testament in due form indeed, but not in a manner consistent with the tie of affection: for if he be really insane the testament is a nullity. 1. And not only may descendants attack the testament of their ascendants as being inofficious, but ascendants also that of their descendants. Sisters or brothers are also by certain imperial constitutions preferred to the appointed heirs, if the latter be infamous persons¹: and therefore they cannot proceed against every heir. Relations more remote than brothers or sisters cannot in any way bring an action or succeed in an action. 2. Now both actual children and children adopted (the classification of our constitution being borne in mind,)² can only employ the action "de inofficioso testamento," when they are unable to obtain the goods of the deceased by any other process³. For those who can by other process obtain the whole inheritance, or a part of it, may not use the action "de inofficioso." After-born

¹ The privilege was confined to brothers and sisters sprung from the same father. Half-brothers or half-sisters by the mother could not sustain the *querela*. C. 3. 28. 27. This, however, was altered by Nov. 118.

² The meaning is that *plena adoptio* alone gave the child the ability to bring a *querela*. I. 11. 2.

³ For instance by grant of *bonorum possessio contra tabulas*, II. 13. 3; or by suing for the *Quarta Antonina*, I. 11. 3.

ire possunt, de inofficioso agere possunt. (3.) Sed accipienda sunt, si nihil eis penitus a testatoribus relictum est. quod nostra constitutio ad veritatem naturae introduxit¹. sin vero quantacumque partem vel res eis fuerit relicta, inofficiosi querela quiescit quod eis deest usque ad quartam legitimae partis², licet non fuerit adiectum, boni viri arbitratu debere soleri. (4.) Si tutor nomine pupilli cuius tutelam gerit testamento patris sui legatum acceperit, cum nihil tutori relictum a patre suo, nihilominus possit nomine inofficioso patris testamento agere³. (5.) Sed et si e

we have also a right to bring the action, if they can reach property in no other way. 3. But these rules are to be applied only when nothing at all has been left them by the testator. The qualification a constitution of our own has introduced of respect for the ties of nature¹. If, on the other hand, any portion whatever of the inheritance or any article belonging to the descendants, the complaint of want of natural affection cannot be brought, and the deficiency in their share must be made up, so that the share may become a fourth of their proportion²; and this is to be so even though no gift has been given (by the testator) that there shall be an estimation according to the estimate of an honest man. Though a tutor may have accepted in the pupil's name a legacy given by his own (i.e. the tutor's) father's testament to the pupil whose affairs he had in charge, no gift being being made to the tutor himself by his father; he is able nevertheless to attach his father's testament on his own account, on the ground of its being "inofficious."³ 5. And in the contrary

28. 30.

a fourth of what they would have received if their parent had died. The *actio in supplementum* did not leave the testament valid, the *inofficiosi* overthrew it. The action was transmissible to the person entitled to it; the latter was not, unless he died in his lifetime; D. 5.

was the rule that acceptance of a legacy barred the descendant's

right of bringing the *querela*, whether the legacy was bequeathed to him personally, to his son, his slave, or even to a stranger who subsequently made a testament and in it passed on the article to the plaintiff as a legacy from the stranger himself. D. 5. 2. 12. pr., D. 5. 2. 31. 3. But an exception was made in favour of persons whose personal interests were in conflict with their duties on behalf of others. D. 5. 2. 22. pr.: D. 5. 2. 10. 1. "Est iniquum,

contrario pupilli nomine cui nihil relictum fuerit de inofficioso egerit, et superatus est, ipse quod sibi in eodem testamento legatum relictum est non amittit¹. (6.) Igitur quartam quis debet habere, ut de inofficioso testamento agere non possit: sive iure hereditario, sive iure legati vel fideicommissi, vel si mortis causa ei quarta donata fuerit², vel inter vivos³, in his tantummodo casibus, quorum nostra constitutio⁴ mentionem facit, vel aliis modis qui constitutionibus continentur⁵. (7.) Quod autem de quarta diximus, ita intellegendum est, ut sive unus fuerit sive plures quibus agere de inofficioso testamento permittitur, una quarta eis dari possit, ut pro rata distribuatur eis, id est pro virili portione quarta⁶.

case if he proceed "de inofficioso" on behalf of a pupil to whom nothing was left, and be defeated, he does not himself lose any legacy bequeathed to him in the same testament¹. 6. In order, then, that a person may be unable to proceed by the action "de inofficioso testamento" he must have a fourth left to him: either by way of inheritance, or by way of legacy or trust, or by a gift *mortis causa*² of the fourth being conferred on him, or a gift *inter vivos*³, but the latter only in those cases which our constitution specifies⁴, or the other cases mentioned by other constitutions⁵. 7. But when we speak of a fourth we must be thus understood, that whether there be one or several having the right to proceed "de inofficioso testamento," one-fourth is to be given amongst them and distributed proportionally, that is to say a fourth of his proper share to each⁶.

damnosum cuique esse officium suum. D. 29. 3. 7.

¹ Usually when a plaintiff failed in his *querela* he lost his legacy, which was forfeited to the *fiscus*. D. 5. 2. 8. 14.

² II. 7. 1.

³ II. 7. 2.

⁴ C. 3. 28. 30. One of the chief cases in which the *donatio inter viros* was counted towards the question, was when the gift was bestowed on that express condition: see § 1 of the above-quoted law in the Code.

⁵ *Sc.* gifts by way of *dos* and

donatio propter nuptias. C. 3. 28, 29.

⁶ Justinian made considerable alterations in the rules of *inofficiositas* in Nov. 115. The chief were (1) that ascendants and descendants must be instituted *heirs*, and that it was not sufficient to bestow the *portio legitima* on them by way of legacy: (2) that the institution of the heirs was the only portion of a testament that became void by the substantiation of a *querela inofficiosi* legacies, trusts, gifts of freedom, &c., being carried into effect; (3)

TIT. XIX. DE HEREDUM QUALITATE ET DIFFERENTIA.

Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

1. Necessarius heres est servus heres institutus, ideo sic appellatus, quia, sive velit sive nolit, omnimodo post mortem estatoris protinus liber et necessarius heres fit. Unde qui facultates suas suspectas habent, solent servum suum primo ut secundo vel etiam ulteriore gradu heredem instituere¹, ut si creditoribus satis non fiat, potius eius heredis bona quam ipsius testatoris a creditoribus possideantur vel distrahantur vel inter eos dividantur². pro hoc tamen incommodo illud ei commodum praestatur, ut ea quae post mortem patroni³ sui sibi acquisierit ipsi reserventur; et quamvis non suffecerint bona defuncti creditoribus, iterum ex ea causa res eius quas sibi acquisierit non veneunt.

TIT. XIX. ON THE DIFFERENT DESCRIPTIONS OF HEIRS.

Heirs are called either *necessarii* or *sui et necessarii* or *extranei*.

1. A necessary heir is a slave instituted heir, so called from the fact that whether he desire it or not, he is in all cases free and necessary heir at once on the death of the testator. Therefore men who suspect themselves to be insolvent generally appoint a slave of their own as heir in the first, or second or even some more remote degree¹, so that if the creditors cannot be paid in full, the goods may be taken possession of by the creditors and sold or distributed amongst them as if they were the property of the heir rather than of the testator himself². In return, however, for this disadvantage, there is allowed him the advantage that whatever he acquires for himself after the death of his patron³ is reserved for himself: and even though the goods should not be sufficient to pay the creditors of the

that the *portio legitima* was to be one half, when it had to be divided amongst four or more claimants; one third when it had to be divided amongst a smaller number. This regulation, however, only applied to ascendants or descendants, bro-

thers and sisters taking no more than the old *quarta legitima*.

¹ II. 15. pr.

² Gaius II. 154.

³ The defunct owner is styled "patron," because the *heres necessarius* was his *libertus orcinus*. II. 24. 2.

2. *Sui autem et necessarii heredes sunt veluti filius filiae, nepos neptisve ex filio, et deinceps ceteri liberi, qui modo in potestate morientis fuerint. sed ut nepos neptisve sui heredes sint, non sufficit eum eamve in potestate avi mortis tempore fuisse, sed opus est, ut pater eius vivo patre suo desierit suus heres esse, aut morte interceptus aut qualibet alia ratione liberatus potestate: tunc enim nepos neptisve in locum patris sui succedit. Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque patre quodammodo domini existimantur¹. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. Necessarii vero ideo dicuntur, quia omnimodo, sive velint sive nolint, tam ab intestato quam ex testamento heredes fiunt. sed his Praetor permittit volentibus abstinere se ab hereditate, ut*

deceased, still the property which he has acquired for himself is not subject to a further sale on the same account.

2. *Heirs sui et necessarii* are such as a son or daughter, a grandson or granddaughter by a son, and others in direct descent, provided only they were under the *potestas* of the dying man. But in order that grandsons or granddaughters may be *sui heredes*, it is not enough for them to have been under the *potestas* of their grandfather at the time of his death, but it is also needful that their father should have ceased to be a *suus heres* in the lifetime of his father, having been either cut off by death or freed from *potestas* in some other way: for then the grandson or granddaughter succeeds into the place of his father. *Sui heredes* have their name from the fact that they are heirs of the house, and even in the lifetime of their father are regarded as owners (of the property) to a certain extent¹. Wherefore, if any one die intestate, the first place in the succession belongs to his descendants. Now they are called *necessarii*, because in every case, whether they wish or not, and whether on intestacy or under a testament, they become heirs. But the Praetor permits them to abstain from the inheritance,

¹ Papinian, D. 38. 6. 7, gives another derivation: "Suum heredem fore cum et ipse fuerit in potestate:" i.e. the ascendant had him in his

potestas, and so he was *suus*, "belonging to him;" just as land or a chattel was also *suum*, because he had *dominium* over it.

potius parentis quam ipsorum bona similiter a creditoribus possideantur¹.

3. Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantur. itaque liberi quoque nostri qui in potestate nostra non sunt, heredes a nobis instituti, extranei heredes videntur. qua de causa et qui heredes a matre instituuntur eodem numero sunt, quia feminae in potestate liberos non habent. servus quoque a domino heres institutus, et post testamentum factum ab eo manumissus, eodem numero habetur². (4.) In extraneis heredibus illud observatur, ut sit cum eis testamenti factio, sive ipsi heredes instituuntur, sive hi qui in potestate eorum sunt. Et id duobus temporibus inspicitur, testamenti quidem facti, ut constiterit institutio³, mortis vero testatoris, ut effectum habeat. hoc amplius et cum adierit hereditatem, esse debet cum eo testamenti factio, sive pure

if they so desire, in order that the goods may, in like manner, be taken possession of by the creditors as those of their ascendant and not as their own¹.

3. All others who are not subject to a testator's authority are called *extraneous* heirs. Thus even our descendants not under our *potestas*, when appointed heirs by us, are regarded as extraneous heirs. Wherefore those who are appointed by a mother are in this same class, because women have not their descendants under their *potestas*. A slave also appointed heir by a master, and manumitted by him after the making of his testament, is reckoned in the same class². 4. There is this rule respecting extraneous heirs, that there must be *testamenti factio* with them, whether they be appointed heirs personally, or whether those be who are under their *potestas*. And this is required to be the case at two periods, viz. when the testament was made, so that the institution may be valid³; and at the death of the testator, that it may take effect. Besides which, when the heir enters on the inheritance there ought to be *testa-*

¹ They could not get rid of the appellation of heirs, but they could get rid of all the practical consequences of heirship by this *beneficium abstinendi* (corresponding to some extent with the *beneficium separationis* allowed to the *necessarius heres*); and so the disgrace of

the sale fell on the memory of the deceased, and not on themselves. Gaius II. 157, 158.

² II. 14. 1.

³ "Quod initio vitiosum est non potest tractu temporis convalescere." Paulus in D. 50. 17. 29.

sive sub condicione heres institutus sit: nam ius heredis eo vel maxime tempore inspiciendum est quo acquirit hereditatem. medio autem tempore inter factum testamentum et mortem testatoris, vel condicionem institutionis existentem¹, mutatio iuris heredi non nocet, quia, ut diximus, tria tempora inspiciamus². Testamenti autem factionem non solum is habere videtur qui testamentum facere potest; sed etiam qui ex alieno testamento vel ipse capere potest vel alii acquirere, licet non potest facere testamentum³. et ideo furiosus, et mutus, et

menti factio with him, whether he be instituted absolutely or conditionally: for the competency of the heir is to be specially investigated at the moment when he acquires the inheritance. But a change of competency does no prejudice to the heir when it occurs in the interval between the making of the testament and the death of the testator or the fulfilment of the condition of institution¹, because, as we have said, the three periods² are what we look at. Not only is a man considered to have *testamenti factio* when he can make a testament, but also when he can either take for himself under another man's testament or acquire for a third party, though unable to make a testament³. And thus a madman, a dumb man, an after-

¹ This rule is stated more clearly in D. 28. 5. 59. 4, where it is said that if an heir be a citizen at the time he is instituted, and afterwards be interdicted from fire and water, he still can take the inheritance provided he has been restored to his civil rights before the death of the testator, supposing his appointment to have been absolute; or before the condition vests, in case he was appointed conditionally. But a change of status occurring between the death of the testator (or the vesting of the condition) and the *aditio* of the heir was absolutely fatal and not remedied by restoration to the prior status, as we see from D. 38. 17. 1. 4. Cf. the notes of Vin-
 nius and Schrader on this passage.

² The three periods meant are (1) the time when the testament was made, (2) the time of the death of the testator, (3) the time when

the condition of appointment comes to pass. In absolute appointments the times (1) and (2) are cardinal, in conditional appointments (1) and (3).

We should naturally have imagined from the opening words of the paragraph that the three times intended were (1) the time of making the testament, (2) that of the testator's death, (3) that of the heir's entrance: but this apparently obvious inference is a wrong one, as we see from the passage D. 38. 17. 1. 4 quoted in the preceding note; and when we look at Justinian's own words "*et mortem testatoris vel condicionem institutionis*," we perceive that although the passage is loosely worded and misleading at first sight, it does really imply a definite first point of time, and one of two subsequent points of time, not three distinct and separate points.

³ See note on I. 10. 6, where the

postumus, et infans, et filiusfamilias, et servus alienus testamenti factionem habere dicuntur: licet enim testamentum facere non possunt, attamen ex testamento vel sibi, vel alii acquirere possunt. (5.) Extraneis autem heredibus deliberandi potestas est de adeunda hereditate vel non adeunda. Sed sive is cui abstinendi potestas est¹ immiscuerit se bonis hereditariis, sive extraneus cui de adeunda hereditate deliberare licet² adierit, postea relinquendae hereditatis facultatem non habet, nisi minor sit annis vigintiquinque. nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita et si temere damnosam hereditatem susceperint, Praetor succurrit. (6.) Sciendum tamen est divum Hadrianum etiam maiori vigintiquinque annis veniam dedisse, cum post aditam hereditatem grande aes alienum quod aditae hereditatis tempore latebat emersisset. sed hoc divus quidem Hadrianus speciali beneficio cuidam praestavit; divus autem Gordianus

born child, an infant, a descendant under *potestas*, and the slave of another person are said to have *testamenti factio*: for although they cannot make a testament, still they can acquire by virtue of a testament either for themselves or for another person. 5. To extraneous heirs there is further allowed a power of deliberating as to entering on the inheritance or not. But if one who has the power of abstaining¹, meddle with the goods of the inheritance; or if one who is allowed to deliberate² as to entering on the inheritance, enter; he has not afterwards the power of abandoning the inheritance, unless he be under twenty-five years of age. For, as the Praetor gives assistance in all other cases to men of this age who have been deceived, so does he also if they have thoughtlessly taken to themselves a ruinous inheritance. 6. We must remark, however, that the late emperor Hadrian granted the same exemption to a person above twenty-five years of age, when after entry on the inheritance a great debt was discovered, which was unknown at the time of entry. But this Hadrian only allowed as a special favour to a particular person: whereas the emperor Gordian afterwards made it a regular exemption,

difference between *testamenti factio activa*, and *testamenti factio passiva* is adverted to.

¹ Sc. the *heres suus et necessarius*.

² Sc. the *heres necessarius*.

postea in militibus tantummodo hoc extendit: sed nostra benevolentia commune omnibus subiectis imperio nostro hoc praestavit beneficium, et constitutionem¹ tam aequissimam quam nobilem scripsit, cuius tenorem si observaverint homines, licet eis et adire hereditatem, et in tantum teneri in quantum valere bona hereditatis contigerit; ut ex hac causa neque deliberationis auxilium eis fiat necessarium, nisi, omissa observatione nostrae constitutionis, et deliberandum existimaverint et sese veteri gravamini additionis supponere maluerint.

7. Item extraneus heres, testamento institutus aut ab intestato ad legitimam hereditatem vocatus, potest aut pro herede gerendo vel etiam nuda voluntate suscipiendae hereditatis heres fieri. pro herede autem gerere quis videtur, si rebus hereditariis tamquam heres utatur, vel vendendo res hereditarias, aut praedia colendo locandove, et quoquo modo si voluntatem suam declaret vel re vel verbis de adeunda hereditate, dummodo sciat eum in cuius bonis pro herede gerit testato intestatove obiisse, et se ei heredem esse. pro

though in favour of soldiers only. 6. But we in our clemency have bestowed this privilege universally on all persons subject to our sway, and have indited a constitution¹, as equitable as it is glorious; by observing the terms whereof, men may enter on an inheritance, and yet be liable to such amount only as the goods of the inheritance are worth: and under these circumstances the protection of deliberation is made unnecessary for them, unless they neglect to avail themselves of our constitution, and, preferring to deliberate, submit themselves to the ancient hazard of entry.

7. Moreover an extraneous heir, either appointed by testament or called on an intestacy to a statutory inheritance, can make himself heir either by acting in that capacity or by the mere expression of a wish to undertake the inheritance. And a man is considered to act as heir, if he deal with the goods of the inheritance as heir, either by selling them, or cultivating or letting lands, or if he in any way make manifest his desire, whether by act or by words, to enter upon the inheritance, provided only he know that the person whose goods he is dealing with as heir has died testate or intestate, and that he is heir to him. For "to act as heir" means to act

¹ C. 6. 30. 11.

de enim gerere est pro domino gerere : veteres enim heredes pro dominis appellabant. Sicut autem nuda voluntate unus heres fit : ita et contraria destinatione statim abditate repellitur¹. Eum qui mutus vel surdus natus est, postea factus, nihil prohibet pro herede gerere et acquirere hereditatem, si tamen intellegit quod agitur.

TIT. XX. DE LEGATIS.

post haec videamus de legatis. Quae pars iuris extra praemam quidem materiam videtur²; nam loquimur de his iuris

owner: since the ancients employed the word "heir" to denote "owner." But just as an extraneous heir makes himself by mere intention, so by a contrary determination he is immediately excluded from the inheritance¹. There is nothing to prevent a dumb or deaf person, who was born such or became such afterwards, from acting as heir and acquiring for himself an inheritance, provided only he understands what is done.

TIT. XX. ON LEGACIES.

next let us consider legacies. Which portion of law seems added beyond the topic at present under review², for we are speaking of those legal methods whereby things are acquired

This paragraph is an abridgement of §§ 1, 2 of C. 6. 30. 22. (as to which see Gaius II. 164) has been abolished in A.D. 407; but no limit could be placed on the heir's time for deliberation by the testator himself; and none could be imposed by the Praetor; creditors made application to the court for that purpose. The enactment of Justinian settled (1) that by acting *pro herede gestio*, without making the benefit of an inventory, the heir made himself liable in full for the debts of the deceased, and could not recede from his engagement; (2) if within three months from the date when he had known that he was appointed he made a formal renunciation, this freed him from all liability, and

such renunciation was final: (3) if the heir wished to accept the inheritance, and yet be free from danger of loss, he must within 30 days from the time when he knew of his appointment commence an inventory, employing public notaries, *tabularii*, to assist him in the matter, and completing the inventory within a period of 60 days. He was then liable to the creditors of the deceased only to the extent of the assets included in the list. In some cases an extension of time was allowed him, for instance if part of the goods were in a distant province; but the inventory must be concluded within a year from the testator's death at the utmost.

² II. 9. 6.

figuris quibus per universitatem res nobis acquiruntur. sed cum omnino de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco potest haec iuris materia tractari.

1. Legatum itaque est donatio quaedam a defuncto relicta¹.

2. Sed olim quidem erant legatorum genera quatuor: per vindicationem, per damnationem, sinendi modo, per praeceptionem²; et certa quaedam verba cuique generi legatorum assignata erant per quae singula genera legatorum significabantur. sed ex constitutionibus divorum Principum sollemnitas huiusmodi verborum penitus sublata est³. nostra autem constitutio⁴

for us in the aggregate: but as we have discussed all points relating to testaments and heirs appointed in testaments, this matter of law may with good reason be discussed in the next place.

1. A legacy then is a gift of a certain kind¹ left by a deceased person. 2. And formerly there were four classes of legacies: namely *per vindicationem*, *per damnationem*, *sinendi modo* and *per praeceptionem*²; certain special wordings being appropriated to each class of legacy, by which the varieties were distinguished. But by constitutions of former emperors formality of such kind in the wording has been abolished³: and a constitution of our own⁴ (which we have drawn up with

¹ A legacy is a gift bestowed in imperative form, whereas a *fidei commissum* is a gift left by way of request: see Ulpian XXIV. 1; the command or request, as the case may be, being in Justinian's days directed to the heir. Under the old system of legacies, there was one variety at any rate, viz. *legata per vindicationem*, where the command was issued to the legatee.

² The wording of the various kinds of legacy is given in full by Gaius II. 192—217, to which passage we therefore refer the reader. The statements of Gaius are also arranged in a tabulated form in App. (I) to our edition of that author.

³ The *Senatusconsultum Nero-*

nianum, referred to by Gaius (II. 197, 218), and Ulpian (XXIV. 11), had enacted "ut quod minus aptis verbis legatum est, perinde sit ac si optimo jure legatum esset." The varieties of legacy were not thereby abolished, but if the intention of the testator could be gathered from the context, that rather than the actual words employed decided which species was intended: and in doubtful cases the legacy would be usually treated as *per damnationem*, that being the most effective form. Constantine, Constantius and Constans, in an edict quoted in C. 6. 37. 21, legislated to the same effect.

⁴ C. 6. 43. 1. The personal action was in olden times the method for recovering a legacy *per damnatio-*

1 cum magna fecimus lucubratione, defunctorum voluntates validiores esse cupientes, et non verbis, sed voluntatibus non faventes, disposuit, ut omnibus legatis una sit natura, libuscumque verbis aliquid derelictum sit, liceat legatariis persequi, non solum per actiones personales, sed etiam per rem et per hypothecariam: cuius constitutionis perpensum omnem ex ipsius tenore perfectissime accipere possibile est.

Sed non usque ad eam constitutionem standum esse credidimus. cum enim antiquitatem invenimus legata quibus stricte concludentem, fideicommissis autem quae ex parte magis descendebant defunctorum¹ pinguiorem naturam indulgentem: necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia, sed deest legatis, hoc repleatur ex natura fideicommissorum,

care, because of our desire that the intentions of the dead should be chiefly regarded, and our preference for such intentions rather than the wording,) has appointed that all legacies shall be of one nature, and that whatever be the form of words in which anything is left, the legatee may proceed for it either by real action, or by action real or hypothecary. The well-considered plan of this constitution may be understood most completely by reference to its actual provisions. 3. But we did not think it right to stop at this constitution: for finding that the ancients strictly limited legacies, but allowed them to have a more unfettered character, because they spring more immediately from the wishes of the deceased¹; we have judged it right to put all legacies on a level with trusts, so that there should be no difference between them; but whatever defect there may be in legacies is supplied from their character as trusts, and the

remedy still applied where a legacy was left to a joint-heir in addition to his portion of the inheritance. The distinction between actions *in rem* and *in personam* is stated in the opening paragraphs of IV. 6:—and the *actio quasi-serviana* or *hypothecaria* is treated of in IV. 6. 7.

¹ “In fideicommissis voluntas magis quam verba plerumque intuenda est.” C. 6. 42. 16.

A legacy *per praeceptionem* may have been pursued by the real action styled *judicium fideicommissum*: and possibly this

et si quid amplius est in legatis, per hoc crescat fideicommissi natura¹. sed ne in primis legum cunabulis, permixte de his exponendo, studiosis adolescentibus quandam introducamus difficultatem, operae pretium esse duximus interim separatim prius de legatis, et postea de fideicommissis tractare, ut natura utriusque iuris cognita facile possint permixtionem eorum eruditi subtilioribus auribus accipere.

4. Non solum autem testatoris vel heredis res, sed et aliena legari potest: ita ut heres cogatur redimere eam et praestare, vel si non potest redimere, aestimationem eius dare². sed si talis res sit cuius non est commercium³, nec aestimatio eius debetur, sicuti si campum Martium, vel basilicas, vel templa, vel quae publico usui destinata sunt legaverit: nam nullius momenti legatum est. Quod autem diximus alienam rem

nature of trusts is improved by any advantage there may be in (regarding them as) legacies¹. But that we may put no difficulty in the way of students by treating of these subjects conjointly at the commencement of their legal course, we have thought it worth while for the present to treat first of legacies, and afterwards of trusts, so that after learning the nature of each, the students may with ears more critical through instruction readily understand the fusion of the two.

4. It is allowable then for a testator to bequeath not only his own property or that of his heir, but also that of third parties: in which case his heir is bound to purchase and deliver it: or to pay its value, if he be unable to purchase it². But if the article be such that there is no power of dealing with it³, the heir is not even bound to pay its value; for instance if any one bequeath the Campus Martius, public buildings, temples, or any thing intended for the use of the community; for the legacy is of no account. And when we said that the property of a third party could be given

¹ Trusts under the old law could often be enforced when legacies could not; and on the other hand, certain convenient forms of action applied to the recovery of legacies but not to the recovery of trusts. Gaius II. 278.

² Gaius II. 202. The heir could pay the value instead of the article

in case the owner demanded an exorbitant price, as well as when he flatly refused to sell. D. 30. 1. 71. 3, D. 32. 1. 14. 2.

³ *Res extra commercium* include *res communes*, *res publicae*, *res universitatis*, *res nullius*: as to which see II. 1.

posse legari, ita intellegendum est, si defunctus sciebat alienam rem esse, non et si ignorabat: forsitan enim, si scisset alienam, non legasset. et ita divus Pius rescriptit, et verius esse ipsum qui agit, id est legatarium, probare oportere scisse alienam rem legare defunctum, non heredem probare oportere ignorasse alienam; quia semper necessitas probandi incumbit illi qui agit¹. (5.) Sed et si rem obligatam creditori aliquis legaverit, necesse habet heres luere. et hoc quoque casu idem placet quod in re aliena, ut ita demum luere necesse habeat heres, si sciebat defunctus rem obligatam esse: et ita divi Severus et Antoninus rescripserunt. si tamen defunctus voluit legatarium luere et hoc expressit, non debet heres eam luere. (6.) Si res aliena legata fuerit et eius vivo testatore legatarius dominus factus fuerit: si quidem ex causa emptionis, ex testamento actione pretium consequi potest: si vero ex causa lucrativa, veluti

as a legacy, we must be understood to mean if the deceased knew that it belonged to the third party, and not if he was unaware of the fact: for perhaps if he had known it belonged to a third party, he would not have bequeathed it. To this effect the late emperor Pius issued a rescript: "it is also correct to state that the plaintiff, that is to say the legatee, is bound to prove that the deceased knew that he was bequeathing another person's property, and the heir is not bound to prove that he was ignorant of its being another's; for the necessity of proof is always incumbent on a plaintiff¹." 5. Again, if any one bequeath an article which has been given in pledge to a creditor, the heir is bound to redeem it. And in this case too the rule is the same as it is with the property of a third party, viz. that the heir is only bound to redeem, supposing the deceased knew that the article was pledged: to which effect the emperors Severus and Antoninus issued a rescript. If, however, the deceased wished the legatee to redeem the pledge, and so stated, the heir is under no obligation to redeem. 6. If the property of another person be bequeathed, and the legatee become owner of it in the testator's lifetime, then, if he acquired it by purchase, he can recover its price by action: but

¹ A maxim of Paulus, quoted in D. 22. 3. 1.

ex donatione vel ex alia simili causa, agere non potest. nam traditum est duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse. hac ratione si ex duobus testamentis eadem res eidem debeatur¹, interest utrum rem an aestimationem ex testamento consecutus est: nam si rem, agere non potest², quia habet eam ex causa lucrativa, si aestimationem, agere potest. (7.) Ea quoque res quae in rerum natura non est, si modo futura est, recte legatur, veluti fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit³. (8.) Si eadem res duobus legata sit, sive coniunctim sive disiunctim: si ambo perveniant ad legatum, scinditur inter eos legatum: si alter deficiat, quia aut spreverit legatum aut vivo testatore decesserit aut alio quolibet modo defecerit, totum ad collegatarium pertinet⁴. coniunctim

if by a profitable title, for instance, by title of gift or any other title of like sort, he cannot sue: for it is a rule that two profitable titles cannot unite in the same person, and in respect of the same thing. Upon this principle, when the same article is due to the same person by virtue of two testaments¹, it is of importance whether he has obtained under the (first) testament the thing or its value: for if he has got the thing, he cannot sue², since he has it already under a valuable title; if the value, he can sue. 7. A thing not yet in existence can be lawfully bequeathed, provided it will hereafter come into existence; as, for instance, the fruits which shall be produced in a certain field, or the child which shall be born of a certain female slave³. 8. If the same thing be left to two persons, whether conjointly or disjunctly, and both accept the legacy, it is divided between them; but if either of them fail to take, because he objects to the legacy, or because he dies in the testator's lifetime, or because he fails in any other way, the whole belongs to his co-legatee⁴. A legacy is left conjointly, when any one words

¹ Two testaments of different persons; not two of the same person, for the execution of the second would destroy the first. II. 17. 2.

² Sc. as legatee under the second testament.

³ Gaius II. 203.

⁴ The laws of accrual of lapsed legacies varied considerably at different periods of Roman history, and those who desire to investigate the subject will find information in App. (G) to our edition of Gaius.

autem legatur, veluti si quis dicat: Titio et Seio hominem Stichum do lego: disiunctim ita: Titio hominem Stichum do lego, Seio Stichum do lego. sed et si expresserit, eundem hominem Stichum, aequè disiunctim legatum intellegitur. (9.) Si cui fundus alienus legatus fuerit, et emerit proprietatem detracto usufructu, et usufructus ad eum pervenerit¹, et postea ex testamento agat: recte eum agere et fundum petere Iulianus ait², quia usufructus in petitione servitutis locum obtinet, sed officio iudicis contineri, ut deducto usufructu iubeat aestimationem praestari. (10.) Sed si rem legatarii quis ei legaverit, inutile legatum est, quia quod proprium est ipsius, amplius eius fieri non potest; et licet alienaverit eam, non debetur nec ipsa nec aestimatio eius³. (11.) Si quis rem suam quasi alienam legaverit, valet legatum:

it thus: "I give and bequeath the slave Stichus to Titius and Seius:" disjunctly, when in these terms; "I give and bequeath the slave Stichus to Titius; I give and bequeath Stichus to Seius." And even if he state explicitly that he gives "the same slave Stichus," still the legacy is considered to be disjoint. 9. If a field belonging to a third person be given as a legacy, and the legatee purchase the ownership minus the usufruct, and the usufruct come to him¹, and he subsequently sue upon the testament, Julian says² that his action and claim for the field are well laid, because in his suit the usufruct is treated as a mere servitude: but in such a case it is part of the duty of the *judex* to order that the value be paid with the usufruct subtracted. 10. But if a man bequeath to a legatee the property of that legatee, the legacy is void, because what is a man's own cannot be made still more his own: and even though he alienate it, still neither the article nor its value is due to him³. 11. If a man bequeath his own property under the impression that it is

¹ Sc. on a profitable title, as the succeeding words shew.

² The opinion is quoted in D. 30. 1. 82. 2. The danger against which the plaintiff had to guard was lest he should render himself liable to a charge of *plus petitio* (IV. 6. 33), in which case he would lose the whole claim. But Julian de-

cided that a man who sues for a field must be taken to sue for it subject to its servitudes.

³ An application of Cato's rule: "any legacy which would have been void if the testator had died immediately, is void whenever he may die." D. 34. 7.

nam plus valet quod in veritate est, quam quod in opinione¹. sed et si legatarii putavit, valere constat, quia exitum voluntas defuncti potest habere. (12.) Si rem suam legaverit testator, posteaque eam alienaverit, Celsus existimat, si non adimendi animo vendidit, nihilominus deberi, idque divi Severus et Antoninus rescipserunt². iidem rescipserunt³ eum qui post testamentum factum praedia quae legata erant pignori dedit, ademisse legatum non videri, et ideo legatarium cum herede agere posse, ut praedia a creditore luan- tur. si vero quis partem rei legatae alienaverit, pars quae non est alienata omnimodo debetur, pars autem alienata ita debetur, si non adimendi animo alienata sit⁴. (13.) Si quis debitori suo liberationem legaverit, legatum utile est; et neque ab ipso debitore, neque ab herede eius potest heres petere, nec ab alio qui

another's, the legacy stands good: for more importance is attached to the real state of the case than to his opinion of it¹. Moreover, if he believed the thing to belong to the legatee, still the legacy is good, because the intent of the deceased can be carried into effect. 12. If a testator bequeath his own property, and afterwards alienate it, Celsus is of opinion that the legacy can still be claimed, if the testator did not sell with the intention of revoking the legacy; and the late emperors Severus and Antoninus issued a rescript to the same effect². They also decided in another rescript³ that a man who after the making of his testament pledged certain lands which had been bequeathed by him did not thereby revoke the legacy; and therefore the legatee could sue the heir to have the lands redeemed from the creditor. But if any person have alienated a part of the article bequeathed, the portion not alienated is of course due, but the alienated portion only when alienated without an intention to revoke the legacy⁴. 13. If a man give as a legacy to his debtor an acquittance from his debt, the legacy is good, and the creditor's heir cannot claim payment either from the debtor, his heir or any person who stands to him in the place

¹ The same maxim is quoted in D. 41. 4. 2. 15, but it is by no means applicable to all cases: in fact the opposite rule "plus esse in opinione quam in veritate" is maintained in D. 29. 2. 5; D. 12. 4.

3. 8, &c.

² Gaius held the opposite view. Gaius II. 198.

³ C. 6. 37. 3.

⁴ D. 30. 1. 8. pr.

heredis loco est¹, sed et potest a debitore conveniri ut liberet eum. potest autem quis vel ad tempus iubere ne heres petat. (14.) Ex contrario si debitor creditori suo quod debet legaverit, inutile est legatum, si nihil plus est in legato quam in debito, quia nihil amplius habet per legatum. quodsi in diem vel sub conditione debitum ei pure legaverit, utile est legatum propter repraesentationem. quodsi vivo testatore dies venerit aut condicio extiterit, Papinianus scripsit², utile esse nihilominus legatum, quia semel constitit. quod et verum est: non enim placuit sententia existimantium³ extinctum esse legatum, quia in eam causam pervenit a qua incipere non potest⁴. (15.) Sed si uxori maritus dotem legaverit, valet legatum, quia plenius est legatum quam de dote actio. sed si quam non acceperit dotem legaverit, divi Severus et Antoninus rescripserunt, si

of heir¹: besides which he (i.e. the heir) may himself be sued by the debtor to give him a release. A man may also forbid his heir to claim payment within a certain time. 14. In the converse case, if a debtor leave to his creditor as a legacy the debt due to him, such legacy is void, supposing there be nothing more in the legacy than in the debt, because he gains no advantage from the legacy. But if he make an absolute bequest of a debt due at a future date or under a condition, that legacy is good on account of its earlier vesting. And even if the day arrive or the condition come to pass during the lifetime of the testator, Papinian held² that the legacy is nevertheless good, because it was once valuable: and this is true; for we have disapproved of the opinion of those³ who maintained that the legacy was extinguished by the existence of circumstances which would have barred its commencement⁴. 15. So again, if a man bequeath to his wife her marriage-portion, the legacy stands good, since a legacy is more valuable than an action to recover the portion. Although, if he bequeath a marriage-portion which he never received, Severus and Anto-

¹ Such as a *bonorum possessor* or *fideicommissarius*.

² Papinian's words are quoted in D. 35. 2. 5.

³ Paulus, for instance. See D. 31. 1. 82. pr.

⁴ Justinian does not reject the

principle in all cases, but only in this particular instance: in IV. 8. 6 for example he transcribes without reprobation a passage from Gaius (IV. 78) where that jurist enunciates the doctrine of Paulus.

quidem simpliciter legaverit, inutile esse legatum; si vero certa pecunia, vel certum corpus, aut instrumentum dotis in praelegando¹ demonstrata sunt, valere legatum. (16.) Si res legata sine facto heredis perierit, legatario decedit. Et si servus alienus legatus sine facto heredis manumissus fuerit, non tenetur heres. si vero heredis servus legatus fuerit, et ipse eum manumiserit, teneri eum Iulianus scripsit, nec interest, scierit, an ignoraverit a se legatum esse. sed et si alii donaverit servum, et is cui donatus est eum manumiserit, tenetur heres, quamvis ignoraverit a se eum legatum esse. (17.) Si quis ancillas cum suis natis legaverit, etiamsi ancillae mortuae fuerint, partus legato cedunt². idem est et si ordinarii servi

ninus laid down in a rescript that the legacy is void, supposing he pass the gift absolutely; whereas if a specific sum of money, or a specific article or an instrument of dower be designated in the bequest¹, the legacy stands good. 16. If the article bequeathed perish without the act of the heir, the loss falls on the legatee: and if a third party's slave bestowed in legacy be manumitted without the act of the heir, the heir is not liable. But if the slave of the heir be bequeathed, and the heir himself manumit him, Julian maintained that the heir was liable, and that it made no matter whether he knew or did not know that the slave had been left away from him: so also in case the heir made a present of the slave to another person, and the recipient manumitted him, the heir is liable, even though he was unaware that the slave was left away from him. 17. If any one bequeath as a legacy his female slaves and their offspring, the offspring belong to the legatee, even though the slaves themselves die². So also if principal slaves be bequeathed

¹ A marriage-portion was usually restored in three instalments, at the end of the first, second and third years severally from the time of the husband's death (see Ulpian vi. 8); but a legacy was due in full from the moment of death. Hence the bequest of a marriage-portion accelerated the payment, and we see the force of the preposition in *praelegare*. Cf. Brissonius *sub verb.*

² The reason of this rule is concisely given by Paulus in D. 33. 8.

3, "quia duo legata sunt separata."

If the children had been accessories to their mother, the death of the latter would have taken away all benefit from the legatee, because accessories cannot be sued for independently, but only through the principal. But that children of a female slave are not accessories to the mother, as lambs to a sheep, is implied in a well-known passage of Gaius (II. 50). See also D. 41. 3. 36. 1.

cum vicariis legati fuerint, et licet mortui sint ordinarii, tamen vicarii legato cedunt¹. Sed si servus cum peculio fuerit legatus, mortuo servo vel manumisso vel alienato, et peculii legatum extinguitur. idem est si fundus instructus vel cum instrumento legatus fuerit: nam fundo alienato et instrumenti legatum extinguitur. (18.) Si grex legatus fuerit, posteaque ad unam ovem pervenerit, quod superfuerit vindicari potest. Grege autem legato, etiam eas oves quae post testamentum factum gregi adiiciuntur legato cedere, Iulianus ait, (est enim gregis unum corpus ex distantibus capitibus, sicuti aedium unum corpus est ex cohaerentibus lapidibus); (19.) aedibus denique legatis columnas et marmora quae post testamentum factum adiecta sunt legato cedere. (20.) Si peculium legatum fuerit, sine dubio quicquid peculio accedit vel decedit vivo testatore legatarii lucro vel damno est. quodsi post mortem

together with their subordinates, the rule is the same; and even though the principal slaves be dead, the subordinates go as a legacy¹. But if a slave be bequeathed together with his *peculium*, the gift of the *peculium* is made void by the death, alienation or manumission of the slave. It is the same if a field be left furnished, or provided with implements, for if the field be alienated, the legacy of the implements falls through. 18. If a flock be the matter of a legacy, and be subsequently reduced to one sheep, a real action can be brought for what remains. Julian further asserts that when a flock is given as a legacy, even those sheep which are added to the flock after the making of the testament belong to the legacy; for a flock is one body made up of various individuals, just as a house is one body composed of materials joined together. 19. Hence when a house is bequeathed, columns and marble-work added to it after the making of the testament are part of the legacy. 20. If a *peculium* be given as a legacy, there is no doubt that any addition or diminution occurring to the *peculium* during the testator's lifetime turns to the profit or loss of the legatee. But if the slave make acquisitions after the death of the testator

¹ The *vicarii* were part of the *peculium* of the *ordinarius*, usually therefore they were accounted accessories to him: but a curious ex-

ception to the rule occurred in the case of a legacy, and the reason of it is difficult to explain.

testatoris ante aditam hereditatem servus adquisierit, Iulianus ait¹, si quidem ipsi manumisso peculium legatum fuerit, omne quod ante aditam hereditatem acquisitum est legatario cedere, quia dies huius legati ab adita hereditate cedit²; sed si extraneo peculium legatum fuerit, non cedere ea legato, nisi ex rebus peculiaribus auctum fuerit. peculium autem, nisi legatum fuerit, manumisso non debetur, quamvis, si vivus manumiserit, sufficit, si non adimatur; et ita divi Severus et Antoninus rescripserunt³. iidem rescripserunt⁴ peculio legato non videri id relictum, ut petitionem habeat pecuniae quam in rationes dominicas impendit. iidem rescripserunt⁵ peculium

and before the inheritance is entered upon, Julian says¹ that when the *peculium* is left to the slave himself who has freedom bestowed upon him, all that has been added before the heir enters on the inheritance goes to the slave as legatee; because the vesting moment² of the legacy is when entry is made; but when the *peculium* is left to another person, the acquisitions do not belong to the legatee, unless they accrued by means of some portion of the *peculium*. The *peculium*, however, does not belong to the manumitted slave, unless bequeathed to him: although if a master manumits in his lifetime, it is enough for the *peculium* not to be expressly withdrawn; and to this effect the late emperors Severus and Antoninus issued a rescript³. They also stated in another rescript⁴, that when his *peculium* is bequeathed to him, it is not to be held that he receives power to claim money which he has expended on behalf of his master. They also laid down in another rescript⁵ that his *peculium* is to

¹ Ulpian in D. 33. 8. 8. 8 ascribes to Julian words which agree in their general sense with what is quoted here.

² "Cedere diem significat incipere deberi pecuniam, venire diem significat eum diem venisse quo pecunia peti potest." Ulpian in D. 50. 17. 213. The vesting moment of a legacy was usually the instant of the testator's death, but there was an exception in the case where a slave's *peculium* was left to himself; for the slave could not labour for his own benefit till manumitted, and

he could not be manumitted till the heir entered on the inheritance: the heir therefore was not allowed to reap a benefit from his own tardiness in entering on the inheritance, but had to give up to the slave the accessions to the *peculium*, in lieu of what he might have earned for himself if liberated sooner.

³ This rescript is alluded to by Ulpian in D. 33. 8. 8. 7.

⁴ Quoted by Ulpian in D. 33. 8. 6. 4.

⁵ D. 33. 8. 8. 7.

videri legatum, cum rationibus redditis liber esse iussus est, et ex eo reliquas inferre. (21.) Tam autem corporales res quam incorporales legari possunt. et ideo et quod defuncto debetur potest alicui legari, ut actiones suas heres legatario praestet, nisi exegerit vivus testator pecuniam: nam hoc casu legatum extinguitur. sed et tale legatum valet: damnas esto heres domum illius reficere, vel illum aere alieno liberare. (22.) Si generaliter servus vel alia res legetur, electio legatarii est, nisi aliud testator dixerit. (23.) Optionis legatum, id est ubi testator ex servis suis vel aliis rebus optare legatarium iusserat, habebat in se condicionem, et ideo nisi ipse legatarius vivus optaverat, ad heredem legatum non trans mittebat. sed ex constitutione nostra¹ et hoc ad meliorem statum reformatum est, et data est licentia et heredi legatarii optare, licet vivus legatarius hoc non fecit. et diligentiore tractatu habito et hoc in nostra constitutione additum est, ut sive plures legatarii existant quibus optio relicta est et dissentiant in

be considered as bequeathed to him, when he is ordered to be free after rendering his accounts, and to make up deficiencies in them out of his *peculium*. 21. All things can be matters of legacy, whether corporeal or incorporeal: and therefore even a debt due to the deceased can be bequeathed to a third party, so that the heir has to make over to the legatee his rights of action, unless the testator has got in the money during his lifetime: for in the latter case the legacy becomes void. A legacy of the following kind is also good: "let my heir be bound to repair the house of so and so, or release him from his debts." 22. If a slave or any other thing be bequeathed without specification, the choice is with the legatee, unless the testator said the contrary. 23. A legacy of election, that is to say, when the testator directs the legatee to elect one of his slaves or other articles of property, used to imply a condition; so that if the legatee did not elect in his lifetime, he did not transmit the legacy to his heir. But by one of our constitutions¹ this has been better regulated and permission to elect is given to the heir of the legatee, if the legatee did not himself elect in his lifetime. And following out the principle further, we have added in our constitution this provision, that if there be either several legatees to whom an election is given, or several heirs of one

¹ C. 6. 43. 3.

corpore eligendo, sive unius legatarii plures heredes et inter se circa optandum dissentiant, alio aliud corpus eligere cupiente, ne pereat legatum (quod plerique prudentium contra benevolentiam introducebant), fortunam esse huius optionis iudicem, et sorte esse hoc dirimendum, ut ad quem sors perveniat, illius sententia in optione praeceat.

24. Legari autem illis solis potest cum quibus testamenti factio est¹.

25. Incertis vero personis neque legata neque fideicommissa olim relinqui concessum erat: nam nec miles quidem incertae personae poterat relinquere, ut divus Hadrianus rescripsit². incerta autem persona videbatur quam incerta opinione animo suo testator subiiciebat, veluti si quis ita dicat: quicumque filio meo in matrimonium filiam suam dederit, ei heres meus illum fundum dato; illud quoque quod his relinquebatur, qui post testamentum scriptum primi Consules designati erunt, aequae incertae personae

legatee, and they cannot agree in their election, one wishing to select one article, another another; then to prevent the legacy being void, (which most lawyers would have it to be, contrary to equitable interpretation,) chance shall be the arbiter of such election, and a settlement must be made by lot, so that the opinion of him on whom the lot falls shall prevail in the election.

24. A legacy can be conferred on those persons only with whom there is *testamenti factio*¹.

25. In olden times it was not allowed to bestow either legacies or trusts upon uncertain persons; for not even a soldier could leave anything to an uncertain person, as the late emperor Hadrian decided in a rescript². Now an uncertain person was considered to be one whom the testator brought before his review without any clear notion of his individuality: for instance if any one words it: "Let my heir give such or such a field to whatever man bestows his daughter in marriage on my son." A gift also which was left to the first persons who should be consuls designate after the execution of a testament, was in like manner regarded as a legacy to an uncertain person; and there

¹ See note on II. 10. 6.

² Gaius II. 287.

legari videbatur. et denique multae aliae huiusmodi species sunt. libertas quoque non videbatur posse incertae personae dari, quia placebat nominatim servos liberari¹. tutor quoque certus dari debebat. sub certa vero demonstratione, id est ex certis personis incertae personae, recte legabatur², veluti: ex cognatis meis qui nunc sunt si quis filiam meam uxorem duxerit, ei heres meus illam rem dato. incertis autem personis legata vel fideicommissa relicta et per errorem soluta repeti non posse sacris constitutionibus cautum erat³.

26. Postumo quoque alieno inutiliter legabatur. est autem alienus postumus, qui natus inter suos heredes testatoris futurus non est; ideoque ex emancipato filio conceptus nepos extraneus erat postumus avo⁴. (27.) Sed nec huiusmodi species penitus est sine iusta emendatione derelicta, cum in nostro codice constitutio posita est⁵ per quam et huic parti medevimus,

are in fact many other instances of the same sort. It was further held that liberty could not be given to an uncertain person, because it was laid down that slaves ought to be set free by name¹. But a legacy could be validly left under a definite description, i.e. to an uncertain individual of a certain class²; for example: "Let my heir give such or such a thing to that one of my relations now alive who shall marry my daughter." But it has been provided by certain imperial constitutions that legacies or trusts bequeathed to uncertain persons, and paid by mistake, cannot be recovered³.

26. A legacy left to an afterborn stranger used also to be invalid. And an after-born stranger is one who, if born, would not be a *suius heres* of the testator; and therefore a grandson conceived from an emancipated son used to be an afterborn stranger in relation to his grandfather⁴. 27. But this point too has not by any means been left without proper amendment: for a constitution has been introduced into our code⁵, whereby we

¹ This was a regulation of the Lex Furia Caninia, passed A.D. 8. See Gaius II. 239, I. 42.

² Gaius II. 238.

³ Although the civil law will furnish no action for the enforcement of a purely natural right, it will allow the latter to be used as a

defence; hence the rule in the text.

⁴ I. 13. 4: Gaius II. 241.

⁵ C. 6. 41. Unfortunately eight leaves are lost from the MS. of the Code at this point, so that we are left ignorant of the provisions of Justinian.

non solum in hereditatibus, sed etiam in legatis et fideicommissis; quod evidenter ex ipsius constitutionis lectione clarescit. tutor autem nec per nostram constitutionem incertus dari debet, quia certo iudicio debet quis pro tutela suae posteritati cavere¹. (28.) postumus autem alienus heres institui et antea poterat et nunc potest, nisi in utero eius sit quae iure nostra uxor esse non potest. (29.) Si quis in nomine, cognomine, praenomine legatarii erraverit testator, si de persona constat, nihilominus valet legatum; idemque in heredibus servatur, et recte: nomina enim significandorum hominum gratia reperta sunt, qui si quolibet alio modo intellegantur, nihil interest. (30.) Huic proxima est illa iuris regula, falsa demonstratione legatum non perimi². veluti si quis ita legaverit, Stichum servum meum verna do lego: licet enim non verna, sed emptus sit, de servo tamen constat, utile est legatum. et convenienter, si ita demonstraverit, Stichum

have remedied this rule not only as to inheritances, but as to legacies and trusts as well: and this becomes perfectly clear from a perusal of the constitution itself. But not even by our constitution is an uncertain tutor allowed to be appointed, because a man ought to provide with definite purpose for the guardianship of his offspring¹. 28. Yet an afterborn stranger could formerly, and can also now, be instituted heir: unless he be the unborn child of a woman who cannot by law be our wife. 29. If a testator make a mistake as to the *nomen*, *cognomen* or *praenomen* of a legatee, the legacy still stands good, if there is no doubt as to the person meant. The same rule holds with regard to heirs, and properly so: for names were invented for the purpose of distinguishing individuals, and it is all the same if they can be identified by any other means. 30. Akin to this is the rule of law, that a legacy is not invalidated by a false description²; for instance if any one word a legacy thus: "I give and bequeath my born-slave Stichus:" for even though he be not his slave by birth, but by purchase, yet if it be certain what slave is meant, the legacy stands good. And on the same principle, if the testator describe the slave thus: "my slave

¹ Gaius II. 240.

² "Neque ex falsa demonstratione

neque ex falsa causa legatum infirmatur." Ulpian XXIV. 19.

servum quem a Seio emi, sitque ab alio emptus, utile est legatum, si de servo constat. (31.) Longe magis legato falsa causa non nocet. veluti cum ita quis dixerit, Titio, quia absente me negotia mea curavit, Stichum do lego: vel ita, Titio, quia patrocínio eius capitali crimine liberatus sum, Stichum do lego: licet enim neque negotia testatoris unquam gessit Titius, neque patrocínio eius liberatus est, legatum tamen valet. sed si conditionaliter enuntiata fuerit causa, aliud iuris est, veluti hoc modo: Titio, si negotia mea curaverit, fundum do lego.

32. An servo heredis recte legamus, quaeritur¹. et constat pure inutiliter legari, nec quicquam proficere, si vivo testatore de potestate heredis exierit, quia quod inutile foret legatum, si statim post factum testamentum decessisset testator, hoc non debet ideo valere, quia diutius testator vixerit². sub con-

Stichus whom I bought from Seius," and he was bought from another person, the legacy stands good, if there be no doubt what slave is meant. 31. Much less does the assignment of a false reason prejudice a legacy, for instance if any one word his bequest: "I give and bequeath Stichus to Titius, because he attended to my business during my absence": or thus: "I give and bequeath Stichus to Titius, because through his advocacy I was acquitted from a capital charge." For although Titius never attended to the business of the testator, or although the testator was never absolved through his advocacy, still the legacy stands good. But the rule is different when the reason has been stated conditionally, for instance in these words: "I give and bequeath the field to Titius, if he attended to my business."

32. Whether we can lawfully give a legacy to the slave of our heir is a disputed point¹. And it is clear that if such a legacy be in absolute terms it is void, and is not made effectual even supposing the slave becomes free from the *potestas* of the heir during the testator's lifetime: because a legacy which would have been unavailing, if the testator had died immediately after the testament was made, ought not to stand good merely because he lived somewhat longer². But such a legacy is

¹ Gaius II. 244; Ulpian XXIV. 23.

² An application of Cato's rule; see note on II. 20. 10.

dicione vero recte legatur, ut requiramus, an quo tempore dies legati cedit in potestate heredis non sit. (33.) Ex diverso, herede instituto servo, quin domino recte etiam sine condicione legetur, non dubitatur¹. Nam et si statim post factum testamentum decesserit testator, non tamen apud eum qui heres sit dies legati cedere intellegitur, cum hereditas a legato separata sit, et possit per eum servum alius heres effici, si prius quam iussu domini adeat in alterius potestatem translatus sit, vel manumissus ipse heres efficitur: quibus casibus utile est legatum; quodsi in eadem causa permanserit et iussu legatarii adierit, evanescit legatum.

34. Ante heredis institutionem inutiliter antea legabatur, scilicet quia testamenta vim ex institutione heredum accipiunt, et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio². pari ratione nec libertas ante heredis institutionem dari poterat³. Sed quia incivile esse

validly given under condition, so that we have then to inquire whether the slave was under the *potestas* of the heir at the vesting moment of the legacy. 33. In the converse case there is no doubt that a legacy can be lawfully bequeathed even without condition to a master, when his slave is appointed heir¹; moreover if the testator die immediately after the making of the testament, still the vesting of the legacy is not considered to be in favour of him who is heir; inasmuch as the inheritance has been separated from the legacy, and a different person may be made heir through the self-same slave, supposing he be transferred into this other's *potestas* prior to his entry at the command of his master, or become heir himself by receiving his liberty: in which cases the legacy takes effect. But if he remain in the same condition, and enter by order of the legatee, the legacy is merged.

34. A legacy in former times was invalid if set down before the institution of the heir; plainly because testaments derive their efficacy from the institution of the heir, and therefore that institution is regarded as the head and foundation of the entire testament². For the same reason, a gift of freedom also could not be given before the institution of the heir³. But as we

¹ Gaius II. 245; Ulpian XXIV. 24.

² Gaius II. 229; Ulpian XXIV. 15.

³ Gaius II. 230; Ulpian I. 20.



putavimus, ordinem quidem scripturae sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem: per nostram constitutionem¹ et hoc vitium emendavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere, et multo magis libertatem cuius usus² favorabilior est.

35. Post mortem quoque heredis aut legatarii simili modo inutiliter legabatur³: veluti si quis ita dicat, cum heres meus mortuus erit, do lego; item pridie quam heres aut legatarius morietur. sed simili modo et hoc correximus⁴, firmitatem huiusmodi legatis ad fideicommissorum similitudinem praestantes, ne vel in hoc casu deterior causa legatorum quam fideicommissorum inveniatur.

36. Poenae quoque nomine inutiliter legabatur et adimebatur vel transferebatur⁵. poenae autem nomine legari videtur quod coercendi heredis causa relinquitur, quo magis is aliquid

thought it unreasonable to regard the order of the writing:—a mode of consideration which even the ancients thought objectionable:—and treat with contempt the wish of the testator; we have by one of our constitutions¹ corrected this anomaly: so that now a man may leave a legacy before the institution of his heir, or between the institutions of his heirs, and a fortiori bestow a gift of freedom, because such a gift is viewed with more favour still².

35. So also a legacy to take effect after the death of the heir or legatee used to be invalid³; for example, when a man worded it thus: "When my heir is dead, I give and bequeath." So too, if he worded it: "the day before my heir or legatee shall die." But we have amended this rule in like manner⁴, giving to such legacies the same validity as to trusts, in order that the rules relating to legacies might not even on this point be harsher than those relating to trusts.

36. Formerly too legacies could not be given, taken away or transferred by way of penalty⁵. A legacy is considered to be by way of penalty, when it is left for the purpose of constraining the heir to do or not to do something: for instance when

¹ C. 6. 23, 24 and 25.

² Usus=in usu esse. Cf. Brissotius *sub verb.*

³ Gaius II. 232; Ulpian XXIV. 16.

⁴ C. 8. 38. 11.

⁵ Gaius II. 235.

faciat aut non faciat: veluti si quis ita scripserit, heres meus, si filiam suam in matrimonium Titio collocaverit (vel ex diverso, si non collocaverit), dato decem aureos Seio; aut si ita scripserit, heres meus, si servum Stichum alienaverit (vel ex diverso, si non alienaverit), Titio decem aureos dato. et in tantum haec regula observabatur, ut perquam pluribus principalibus constitutionibus significetur¹, nec Principem quidem agnoscere quod ei poenae nomine legatum sit. nec ex militis quidem testamento talia legata valebant, quamvis aliae militum voluntates in ordinandis testamentis valde observantur². quin etiam nec libertatem poenae nomine dari posse placebat³. eo amplius nec heredem poenae nomine adiici posse Sabinus existimabat⁴, veluti si quis ita dicat, Titius heres esto, si Titius filiam suam Seio in matrimonium collocaverit, Seius quoque heres esto: nihil enim intererat, qua ratione Titius coërcetur, utrum legati datione, an coheredis adiectione. Sed huius-

a testator words the gift thus: "If my heir shall bestow his daughter in marriage upon Titius (or vice versa, if he do not bestow her), let him give ten *aurei* to Seius:" or when he words it thus: "if my heir alienate my slave Stichus (or vice versa, if he do not alienate him), let him give ten *aurei* to Titius." And this rule was carried out so rigorously, that it was stated in a very large number of imperial constitutions¹ that even the emperor would not accept a legacy which was given to him by way of penalty. And such legacies were not valid even under a soldier's testament, although the intentions of soldiers at the time they executed their testaments were in other cases strictly attended to². It was further ruled that even a gift of freedom could not be bestowed by way of penalty³. And Sabinus also thought⁴ that a second heir could not be added by way of penalty; for example when the wording was: "Let Titius be heir, but if Titius bestow his daughter in marriage on Seius, let Seius also be heir." For it was unimportant in what way Titius was coerced, whether by the gift of a legacy or the addition of a co-heir. But refinement of this sort did not meet

¹ One constitution to this effect is referred to in Capitol. *A. Pio* 8.

² II. II.

³ Gaius II. 236.

⁴ Gaius II. 243.

modi scrupulositas nobis non placuit, et generaliter ea quae relinquuntur, licet poenae nomine fuerint relicta vel adempta vel in alios translata, nihil distare a ceteris legatis constituimus¹ vel in dando vel in adimendo vel in transferendo; exceptis his videlicet quae impossibilia sunt vel legibus interdicta aut alias probrosa: huiusmodi enim testatorum dispositiones valere secta temporum meorum non patitur².

TIT. XXI. DE ADEMPTIONE LEGATORUM.

Ademptio legatorum, sive eodem testamento adimantur sive codicillis, firma est, sive contrariis verbis fiat ademptio, veluti si quod ita quis legaverit *do lego*, ita adimatur non *do* non *lego*, sive non contrariis, id est aliis quibuscumque verbis³. (1.) Transferri quoque legatum ab alio ad alium potest, veluti si quis ita dixerit, hominem Stichum quem Titio legavi

with our approval, and we have ordained¹ in general terms that whatever is left, revoked or transferred to different persons by way of penalty shall not differ from other legacies either in form of gift, revocation or transfer: those directions being excepted which are impossible, contrary to law, or otherwise worthy of reprobation. For testamentary dispositions of these kinds the spirit of our times does not tolerate².

TIT. XXI. ON THE REVOCATION OF LEGACIES.

The revocation of legacies is valid, whether they be revoked in the same testament or in a codicil; and whether in contrary terms, for example when a person has given a legacy in the words "I give and bequeath," and the revocation is worded "I do not give and bequeath;" or in words not contrary, that is to say in any other words whatever³. 1. A legacy may also be transferred from one person to another, for instance when a testator says "I give and bequeath to Seius the slave Stichus whom I bequeathed to Titius," whether he do this in the same

¹ C. 6. 41. 1.

² See App. G. for a systematic account of the Roman Law of legacies.

³ In Ulpian's time the revocation had to be in "contrary words." See Ulp. xxiv. 29.

Seio do lego, sive in eodem testamento sive in codicillis hoc fecerit. quo casu simul Titio adimi videtur et Seio dari.

TIT. XXII. DE LEGE FALCIDIA.

Superest ut de lege Falcidia dispiciamus, qua modus novissime legatis impositus est. Cum enim olim lege duodecim tabularum¹ libera erat legandi potestas, ut liceret vel totum patrimonium legatis erogare (quippe ea lege ita cautum esset: uti legassit suae rei, ita ius esto): visum est hanc legandi licentiam coartare, idque ipsorum testatorum gratia provisum est, ob id quod plerumque intestati moriebantur, recusantibus scriptis heredibus pro nullo aut minimo lucro hereditates adire. et cum super hoc tam lex Furia² quam lex Voconia³ latae sunt, quarum neutra sufficiens ad rei consummationem videbatur: novissime lata est lex Falcidia⁴, qua cavetur, ne plus legare liceret quam dodrantem totorum bonorum, id

testament or in a codicil. In which case the legacy is considered to be simultaneously taken from Titius and given to Seius.

TIT. XXII. ON THE LEX FALCIDIA.

It remains for us to consider the Lex Falcidia, the latest by which limitation has been imposed on legacies. For whereas in olden times, according to a law of the Twelve Tables¹, there was unrestricted power of giving legacies, so that a testator might expend his whole estate in them (the law providing that "in accordance with the bequests of his property, so shall the right be"); it afterwards seemed right to restrain this liberty of bequeathing. And this was done for the benefit of testators themselves, because men used often to die intestate, the appointed heirs declining to enter upon an inheritance for little or no profit. Wherefore after the Lex Furia² and Lex Voconia³ had been enacted, neither of which proved adequate to effect the purpose, the Lex Falcidia⁴ was eventually passed, in which it is provided that no man may give away in legacies more than

¹ Tab. v. l. 3.

² B.C. 182. See for its provisions Gaius II. 225.

³ B.C. 168. See Gaius II. 226.

⁴ B.C. 39. Gaius II. 227; Ulpian XXIV. 32.

est, ut sive unus heres institutus esset, sive plures, apud eum eosve pars quarta remaneret.

1. Et cum quaesitum esset, duobus heredibus institutis, veluti Titio et Seio, si Titii pars aut tota exhausta sit legatis quae nominatim ab eo data sunt, aut supra modum onerata, a Seio vero aut nulla relicta sint legata, aut quae partem eius dumtaxat in partem dimidiam minuunt, an, quia is quartam partem totius hereditatis aut amplius habet, Titio nihil ex legatis quae ab eo relicta sunt retinere liceret? placuit, ut quartam partem suae partis salvam habeat: etenim in singulis heredibus ratio legis Falcidiae ponenda est. (2.) Quantitas autem patrimonii ad quam ratio legis Falcidiae redigitur mortis tempore spectatur. itaque si verbi gratia is qui centum aureorum patrimonium in bonis habebat centum aureos legaverit, nihil legatariis prodest, si ante aditam hereditatem per servos hereditarios aut ex partu ancillarum hereditariarum aut ex fetu pecorum tantum accesserit hereditati, ut centum aureis legatorum nomine erogatis heres quartam partem hereditatis

three-quarters of his entire property, so that whether one heir be appointed or more, a fourth part must remain to him or them.

1. In the case where two heirs were appointed, as Titius and Seius, and the portion of Titius was altogether exhausted, or at any rate immoderately burdened, by legacies expressly charged upon him, whilst no legacies were charged upon Seius, or only such as reduced his portion by one-half; it was debated whether Titius should be prevented from retaining anything out of the legacies charged on him, because Seius had a quarter or more of the entire inheritance: and it was decided that he might make retention, so as to have the fourth of his own share: because the principle of the Falcidian law is to be applied to the heirs separately. 2. The value of an estate to which the principle of the *Lex Falcidia* is applied is taken at the time of death. If therefore, by way of example, a man possessing property worth one hundred *aurei* give away a hundred *aurei* in legacies, the legatees are in no way benefited by so large an addition being made to the inheritance before it is entered upon, whether by the acquisitions of slaves, or by the offspring of slaves belonging to the inheritance, or by the offspring of cattle, that the heir would have a fourth part after paying away a hundred *aurei* in discharge of legacies:

habiturus sit, sed necesse est, ut nihilominus quarta pars legatis detrahatur. ex diverso si septuaginta quinque legaverit, et ante aditam hereditatem in tantum decreverint bona incendiis forte aut naufragiis aut morte servorum, ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus relinquatur, solida legata debentur. nec ea res damnosa est heredi, cui liberum est non adire hereditatem: quae res efficit, ut necesse sit legatariis, ne destituto testamento nihil consequantur, cum herede in portionem pacisci. (3.) Cum autem ratio legis Falcidiae ponitur, ante deducitur aes alienum, item funeris impensa et pretia servorum manumissorum; tunc deinde in reliquo ita ratio habetur, ut ex eo quarta pars apud heredes remaneat, tres vero partes inter legatarios distribuuntur, pro rata scilicet portione eius quod cuique eorum legatum fuerit. itaque si fingamus quadringentos aureos legatos esse, et patrimonii quantitatem ex qua legata erogari oportet quadringentorum esse, quarta pars singulis legatariis detrahi debet. quod si trecentos quinquaginta legatos finga-

but it is still a necessity that one-fourth should be deducted from these legacies. In the opposite case, if the testator give away seventy-five in legacies, and before entry is made on the inheritance, the property be so diminished, by fire, for instance, or by shipwreck, or by the death of slaves, that no more is left than the value of seventy-five *aurei*, or even less, the legacies are due without deduction. Nor is this fact detrimental to the heir, for he is at liberty not to enter on the inheritance: and therefore it becomes needful for the legatees to agree with the heir to accept a part, lest they get nothing at all by the testament being abandoned. 3. Also when the calculation is made under the *Lex Falcidia*, debts, funeral expenses and the value of manumitted slaves are first set off, and then an apportionment of the residue takes place, in such wise that a fourth part thereof remains with the heirs, and three-fourths are distributed amongst the legatees, in proportion of course to the bequest made to each of them. Hence, if we suppose four hundred *aurei* to be given away in legacies, and the value of the estate out of which the legacies are to be paid to be four hundred, a quarter must be taken from each legatee: whilst if we suppose three hundred and fifty to be the amount of the legacies, an eighth must

mus, octava debet detrahi¹. quodsi quingentos legaverit, initio quinta, deinde quarta detrahi debet: ante enim detrahendum est quod extra bonorum quantitatem est, deinde quod ex bonis apud heredem remanere oportet.

TIT. XXIII. DE FIDEICOMMISSARIIS HEREDITATIBUS.

Nunc transeamus ad fideicommissa. Et prius de hereditatibus fideicommissariis videamus.

I. Sciendum itaque est omnia fideicommissa primis temporibus infirma esse, quia nemo invitus cogebatur praestare id de quo rogatus erat: quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant; et ideo fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur. Postea primus divus Augustus, semel iterumque gratia personarum motus, vel

be taken from them¹. But if he gave in legacies five hundred, first a fifth and then a fourth must be deducted: for we must first take away the excess above the value of the goods, and then the proportion of the goods which ought to remain with the heir.

TIT. XXIII. ON TRUST INHERITANCES.

Now let us pass on to trusts. And first we have to consider trust inheritances.

I. We must remember, then, that in early times trusts were not binding, because no man was compelled against his will to perform what he was merely *requested* to do. For when testators wished to leave an inheritance or legacies to persons to whom they could not lawfully leave them, they entrusted them to the good faith of some one capable of taking under their testament: and from this circumstance trusts got their name, because they were dependent on no legal tie, but only on the sense of honour of those requested to carry them out. Afterwards the Emperor Augustus on more than one occasion, being influenced by private

¹ One-seventh of each legacy must be deducted: but the aggregate of these sevenths will amount to 50

aurei, i. e. to one-eighth of the whole estate.

quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, iussit Consulibus auctoritatem suam interponere. quod quia iustum videbatur et popolare erat, paulatim conversum est in assiduam iurisdictionem; tantusque favor eorum factus est, ut paulatim etiam Praetor proprius creatur qui fideicommissis ius diceret, quem fideicommissarium appellabant.

2. In primis igitur sciendum est opus esse, ut aliquis recto iure testamento heres instituat, eiusque fidei committatur, ut eam hereditatem alii restituat: alioquin inutile est testamentum in quo nemo heres instituitur¹. Cum igitur aliquis scripserit, Lucius Titius heres esto: poterit adiicere, rogo te, Luci Titi, ut cum primum possis hereditatem meam adire, eam Caio Seio reddas restituas. potest autem quisque et de parte restituenda heredem rogare; et liberum est vel pure vel sub condicione relinquere fideicommissum, vel ex die certo. (3.) Restituta autem hereditate is

solicitation, or because the trustee was said to have been adjured "by the safety of the Emperor," or by reason of some notorious instances of perfidy, commanded the consuls to interpose their authority. And this intervention appearing equitable, and being approved of by the people, by degrees was turned into a standing jurisdiction: the popularity of trusts becoming so great that eventually a special praetor, who bore the name of *fideicommissarius*, was appointed to decide questions relating to them.

2. We must understand then that first of all some heir must be appointed in due form, to whose good faith must be entrusted the delivery of the inheritance to the other person; for if this be not done, the testament is invalid for want of a duly-appointed heir¹. When therefore a testator has written: "Let Lucius Titius be heir," he may add: "I ask you, Lucius Titius, that as soon as you can enter on my inheritance, you will render and deliver it over to Caius Seius." A testator may also request his heir to deliver over a part; and he is at liberty to leave a trust either absolutely, or conditionally, or from a certain day. 3. After an in-

¹ Gaius II. 248.

qui restituit nihilominus heres permanet; is vero qui recipit hereditatem, aliquando heredis, aliquando legatarii loco habebatur¹.

4. Et in Neronis quidem temporibus, Trebellio Maximo et Annaeo Seneca Consulibus, senatusconsultum factum est², quo cautum est, ut si hereditas ex fideicommissi causa restituta sit, omnes actiones quae iure civili heredi et in heredem competere ei et in eum darentur cui ex fideicommisso restituta esset hereditas. Post quod senatusconsultum Praetor utiles actiones³ ei et in eum qui recepit hereditatem, quasi heredi et in heredem dare coepit. (5.) Sed quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum

inheritance has been delivered over, he who has delivered it still remains heir: whilst he who receives it used formerly to be regarded in some cases as an heir, in others as a legatee¹.

4. A *senatusconsultum* was passed in the time of Nero², when Trebellius Maximus and Annæus Seneca were consuls, wherein it was provided that if an inheritance were delivered over in accordance with a trust, all the actions which by the civil law would lie for and against the heir, should be granted for and against him to whom the inheritance was delivered in conformity with the trust. After the passing of this *senatusconsultum*, the Praetor began to grant *utiles actiones*³ for and against him who received the inheritance, as though for and against an heir. 5. But since the appointed heirs, being generally asked to deliver the whole or nearly the whole of an inheritance, refused to enter

¹ But after Justinian's legislation the *fideicommissarius* was in all cases *in loco heredis*. See § 7 below.

² Gaius II. 253. The wording of the S.C. will be found in D. 36. 1. 1. 2.

³ See note on II. 1. 34. Before the passing of the S.C. Trebellianum the heir used to protect himself, as far as possible, against loss by refusing to take up the inheritance till the beneficiary joined in certain agreements called "*stipulationes emptæ et venditæ hereditatis*;" the purport

of which was that the heir should deliver over all profits of the inheritance, present or future, and be reimbursed for all his costs and expenses. This however being a merely personal guarantee on the part of the beneficiary would not protect the heir against the creditors of the estate, if the beneficiary were insolvent: besides which the heir had the trouble of bringing and defending actions in which he had no private interest. See Gaius II. 252.

recusabant, atque ob id extinguebantur fideicommissa : postea Vespasiani Augusti temporibus, Pegaso et Pusione Consulibus, senatus censuit, ut ei qui rogatus esset hereditatem restituere perinde liceret quartam partem retinere, atque ex lege Falcidia in legatis retinere conceditur. ex singulis quoque rebus quae per fideicommissum relinquuntur eadem retentio permissa est. Post quod senatusconsultum ipse heres onera hereditaria sustinebat; ille autem qui ex fideicommisso recepit partem hereditatis legatarii partiarum loco erat, id est eius legatarii cui pars bonorum legabatur. quae species legati partitio vocabatur, quia cum herede legatarius partiebatur hereditatem. unde quae solebant stipulationes inter heredem et partiarum legatarium interponi, eadem interponebantur inter eum qui ex fideicommisso recepit hereditatem, et heredem, id est ut et lucrum damnumque hereditarium pro rata parte inter eos commune sit¹. (6.) Ergo si quidem non plus quam dodrantem

upon it for little or no gain, and thus trusts became inoperative; therefore afterwards in the time of the Emperor Vespasian, during the consulship of Pegasus and Pusio, the senate decreed that he who was asked to deliver an inheritance should be allowed to retain a fourth part, just as the right of retention is permitted by the Falcidian law in respect of legacies. The same retention was also allowed in the case of individual things left in trust. After the passing of the *senatusconsultum* the heir himself sustained the burdens of the inheritance, whilst he who received the rest of the inheritance in consequence of the trust was in the position of a partiar legatee, i.e. of a legatee to whom a share of a property is left; which species of legacy was called *partitio* from the fact that the legatee shared (*partiebatur*) the inheritance with the heir. The result of this was that the same stipulations which were usually entered into between the heir and the partiar legatee, were also entered into between the receiver of the inheritance under the trust and the heir, i.e. that the gain and loss of the inheritance should be shared between them in proportion to their interests¹. 6. If then the appointed heir were asked to deliver not more

¹ Gaius II. 254. It is plain that the S.C. Pegasianum did more than allow the heir to retain a fourth

when trusts had been charged on him in excess of three-fourths of the inheritance. If this had been its

hereditatis scriptus heres rogatus sit restituere, tunc ex Trebelliano senatusconsulto restituebatur hereditas, et in utrumque actiones hereditariae pro rata parte dabantur: in heredem quidem iure civili; in eum vero qui recipiebat hereditatem ex senatusconsulto Trebelliano tamquam in heredem. At si plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus erat Pegasiano senatusconsulto, et heres qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinebat. sed quarta quidem retenta quasi partis et pro parte stipulationes interponebantur tamquam inter partiarium legatarium et heredem; si vero totam hereditatem restituerit, emptae et venditae here-

than three-fourths of the inheritance, the delivery was made in accordance with the *senatusconsultum Trebellianum*, and actions in connection with the inheritance used to be allowed against both parties according to the extent of their interests: against the heir by the civil law, and against him who received the inheritance by the *senatusconsultum Trebellianum*, as though against an heir. But if he were asked to deliver more than three-fourths, or even the whole inheritance, the *senatusconsultum Pegasianum* applied; and the heir who had once entered on the inheritance, provided only he did so of his own free-will, whether he retained or did not care to retain the fourth part, sustained all the burdens of the inheritance himself: but when the fourth was retained, stipulations resembling those called *partis et pro parte* used to be employed, as between a partiary legatee and an heir; whilst if the heir delivered the whole inheritance, stipulations of "bought

sole provision, there would have been no need of stipulations between the heir and beneficiary, but the S.C. Trebellianum would have ensured a division of profits and liabilities between the two. The S.C. Pegasianum must have enacted further, 1st, that when the heir claimed to have his portion made up to one-fourth, he should become liable to all charges and appropriate all benefits: and 2nd (as we see from § 6) it must have laid down

the same rule in *all cases* where more than three-fourths was to be delivered, so that even if the heir did not avail himself of his right to augment his own share, he still remained under the duty of maintaining all actions and satisfying all claims. The S.C. Trebellianum was allowed still to apply to cases where less than three-fourths of an estate was left in trust, but to no case where more was to be delivered over.

ditatis stipulationes interponebantur. sed si recuset scriptus heres adire hereditatem, ob id quod dicat eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut desiderante eo cui restituere rogatus est, iussu Praetoris adeat et restituat hereditatem, perindeque ei et in eum qui recepit hereditatem actiones dentur, acsi iuris est ex Trebelliano senatusconsulto. quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui recepit hereditatem, utroque senatusconsulto in hac specie concurrente.

7. Sed quia stipulationes ex senatusconsulto Pegasiano descendentes et ipsi antiquitati displicuerunt, et quibusdam casibus captiosas eas homo excelsi ingenii Papinianus appellat, et nobis in legibus magis simplicitas quam difficultas placet, ideo omnibus nobis suggestis tam similitudinibus quam differentiis utriusque senatusconsulti, placuit¹, exploso senatusconsulto Pegasiano quod postea supervenit, omnem auctori-

and sold inheritance" used to be employed. If, however, the appointed heir refuse to enter upon the inheritance, alleging that he suspects it will prove a loss to him, it is provided in the *senatusconsultum Pegasianum* that at the request of the person to whom he is asked to deliver it, he shall enter by order of the Praetor and make the transfer; and that all actions are to be allowed for and against him who receives such inheritance according to the rule under the *senatusconsultum Trebellianum*. In this event no stipulations are needed, because at the same time security is afforded to him who has delivered the inheritance, and the actions attaching to it are transferred for and against him who has received it: both the *senatusconsulta* applying concurrently to this case.

7. But as the stipulations connected with the *senatusconsultum Pegasianum* were disapproved of even by the ancients, and that man of lofty genius, Papinian, affirms that they are captious in some cases; and as simplicity rather than complexity in laws is to our own taste; therefore, upon a report being presented to us of all the points of resemblance and difference in the two *senatusconsulta*, we have ordained¹ that the *senatusconsultum Pegasianum*, which was the later one, shall be

¹ The constitution is not extant.

tatem Trebelliano senatusconsulto praestare, ut ex eo fideicommissariae hereditates restituantur, sive habeat heres ex voluntate testatoris quartam, sive plus, sive minus, sive penitus nihil, ut tunc, quando vel nihil vel minus quartae apud eum remanet, liceat ei vel quartam vel quod deest ex nostra auctoritate¹ retinere vel repetere solutum quasi ex Trebelliano senatusconsulto, pro rata portione actionibus tam in heredem quam in fideicommissarium competentibus. si vero totam hereditatem sponte restituerit, omnes hereditariae actiones fideicommissario et adversus eum competunt. sed etiam id quod praecipuum Pegasiani senatusconsulti fuerat, ut quando recusabat heres scriptus sibi datam hereditatem adire, necessitas ei imponeretur totam hereditatem volenti fideicommissario restituere et omnes ad eum et contra eum transire actiones, et hoc transponimus ad senatusconsultum Trebellianum, ut ex hoc solo et necessitas heredi imponatur, si ipso nolente adire

repealed, and universal authority be conferred upon the *senatusconsultum Trebellianum*, so that trust-inheritances shall be delivered over according to its provisions, whether the heir retain by desire of the testator a fourth, or more, or less, or nothing at all: but so that when nothing or less than a quarter is left to him, he may on our authority¹ retain either a quarter or the portion of a quarter which is deficient, or demand it back again if paid; and actions shall lie against both the heir and the beneficiary under the trust according to their interests, as though under the *senatusconsultum Trebellianum*. But if the heir freely deliver over the entire inheritance, all the actions attaching thereto shall be brought by and against the beneficiary. And further, as to the provision which was peculiar to the *senatusconsultum Pegasianum*, viz. that when the appointed heir refused to enter on the inheritance conferred upon him he might be compelled to deliver over the inheritance to the beneficiary at the request of the latter, and that all actions should be transferred to him and against him;—this too we have introduced into the *senatusconsultum Trebellianum*; so that by the latter alone is compulsion now applied to the heir when he declines to enter, and when the beneficiary requests that the inheritance

¹ The S.C. Pegasianum having been repealed, Justinian re-enacted this portion of it; hence “ex nostra auctoritate.”

fideicommissarius desiderat restitui sibi hereditatem, nullo nec damno nec commodo apud heredem manente.

8. Nihil autem interest utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogatur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogatur: nam et hoc casu eadem observari praecipimus quae in totius hereditatis restitutione diximus¹.

(9.) Si quis una aliqua re deducta sive praecepta quae quartam continet, veluti fundo vel alia re, rogatus sit restituere hereditatem: simili modo ex Trebelliano senatusconsulto restitutio fiat, perinde acsi quarta parte retenta rogatus esset reliquam hereditatem restituere. Sed illud interest, quod altero casu, id est cum deducta sive praecepta aliqua re restituitur hereditas, in solidum ex eo senatusconsulto actiones transferuntur, et res quae remanet apud heredem sine ullo onere hereditario apud eum manet, quasi ex legato ei acquisita; altero vero casu, id est cum quarta parte retenta

may be delivered over to himself, with the result that neither gain nor loss shall belong to the heir.

8. Again, it makes no difference whether a person appointed heir to the whole inheritance be requested to deliver over the inheritance wholly or partly, or whether the heir appointed to a part be requested to deliver over the whole of that part or a part of that part; for in the latter case also we command the same rules to be observed which we have laid down as to the delivery of an entire inheritance¹. 9. If any one be requested to deliver over an inheritance after deducting or retaining some single article, a field, for instance, or anything else, which comprises the fourth part; the delivery takes place, in like manner, under the *senatusconsultum Trebellianum*, just as it would do if he had been asked to keep a fourth part and then hand over the rest of the inheritance. But there is this difference, that in the one case, viz. when an inheritance is delivered over after the deduction or retention of a particular article, the actions are altogether transferred under that *senatusconsultum*, and the article which remains in the heir's hands is left with him free from any burden connected with the inheritance, as though acquired by legacy; but in the other

¹ Gaius II. 259.

rogatus est heres restituere hereditatem et restituit, scinduntur actiones, et pro dodrante quidem transferuntur ad fideicommissarium, pro quadrante remanent apud heredem. quin etiam, licet una re aliqua deducta aut praecepta restituere aliquis hereditatem rogatus est, qua maxima pars hereditatis contineatur, aequè in solidum transferuntur actiones, et secum deliberare debet is cui restituitur hereditas, an expediat sibi restitui. eadem scilicet interveniunt et si duabus pluribusve deductis rebus praeceptisve restituere hereditatem rogatus sit. sed et si certa summa deducta praeceptave, quae quartam vel etiam maximam partem hereditatis continet, rogatus sit aliquis hereditatem restituere, idem iuris est. Quae diximus de eo qui ex asse heres institutus est, eadem transferimus et ad eum qui ex parte heres scriptus est.

10. Praeterea intestatus quoque moriturus potest rogare eum ad quem bona sua vel legitimo iure vel honorario pertinere intellegit, ut hereditatem suam totam partemve eius, aut rem aliquam, veluti fundum, hominem, pecuniam, alicui

case, viz. when the heir is asked to keep a fourth and deliver over the inheritance, and does so, the actions are divided, and transferred as to three quarters to the beneficiary, remaining with the heir as to the other quarter. And even though an heir be requested to deliver over an inheritance after deducting or retaining some single article in which is comprised the greater part of the inheritance, the actions are nevertheless transferred altogether, and the person to whom the inheritance is to be delivered ought to deliberate whether it is to his advantage that it should be delivered. The same principles of course apply also if an heir be asked to deliver over the inheritance after two or more things have been deducted or retained; and the rule is the same if an heir be asked to deliver over the inheritance after deducting or retaining a specified sum of money which comprises the fourth part or even the greater part of the inheritance. And what we have said of a person appointed heir to the whole inheritance, we also apply to one who is appointed heir to a part.

10. Moreover, a person about to die intestate may ask the man on whom he knows that his goods will devolve either by civil or praetorian law, to deliver over to another person his inheritance wholly or in part, or any article, for

restituat: cum alioquin legata, nisi ex testamento, non valeant¹. (11.) Eum quoque cui aliquid restituitur potest rogare, ut id rursus alii totum aut pro parte, vel etiam aliud aliquid restituat². (12.) Et quia prima fideicommissorum cunabula a fide heredum pendent, et tam nomen quam substantiam acceperunt, et ideo divus Augustus ad necessitatem iuris ea detraxit: nuper et nos, eundem Principem superare contententes, ex facto quod Tribonianus, vir excelsus, Quaestor sacri palatii, suggestit, constitutionem³ fecimus per quam disposuimus: si testator fidei heredis sui commisit, ut vel hereditatem vel speciale fideicommissum restituat, et neque ex scriptura, neque ex quinque testium numero qui in fideicommissis legitimus esse noscitur, res possit manifestari, sed vel pauciores quam quinque vel nemo penitus testis intervenerit, tunc, sive pater heredis sive alius quicumque sit qui fidem elegerit heredis et ab eo aliquid restitui voluerit, si heres perfidia tentus adimplere fidem recusat, negando rem ita esse sub-

instance a field, a slave, or money; whilst legacies, on the contrary, are only valid when given by testament¹. 11. He may also request the man to whom anything is delivered to pass it on again to another person, either wholly or partially, or even to give him something else². 12. Moreover, since trusts originally depended upon the good faith of heirs, and from this fact derived both their name and their character; and for this reason the Emperor Augustus converted them into a legal obligation; we have lately endeavoured ourselves to outdo that emperor, and have made a constitution³, in consequence of a matter brought under our notice by that eminent man Tribonian, Quaestor of our sacred palace, in which we have enacted as follows: that if a testator has depended on the good faith of his heir to deliver over the inheritance or some special gift in trust, and the matter cannot be proved either by a writing or by five witnesses (the number which is recognized as legal in the case of trusts), but a smaller number than five or none at all were present; then whether it be the father of the heir or any other person who has trusted to the heir's good faith and asked that something be delivered over by him, and the heir has treacherously endeavoured to avoid

¹ Gaius II. 270.² Gaius II. 260, 271.³ C. VI. 42. 32.

secutam, si fideicommissarius iusiurandum ei detulerit, cum prius ipse de calumnia iuraverit¹, necesse eum habere, vel iusiurandum subire quod nihil tale a testatore audivit, vel recusantem ad fideicommissi vel universitatis vel specialis solutionem coartari, ne depereat ultima voluntas testatoris fidei heredis commissa. eadem observari censuimus et si a legatario vel fideicommissario aliquid similiter relictum sit. quodsi is a quo relictum dicitur confiteatur quidem aliquid a se relictum esse, sed ad legis subtilitatem decurrat², omnimodo cogendus est solvere.

TIT. XXIV. DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS.

Potest autem quis etiam singulas res per fideicommissum relinquere, veluti fundum, hominem, vestem, argentum, pecuniam numeratam; et vel ipsum heredem rogare, ut alicui restituat,

fulfilment of his engagement by denying that the affair took place as asserted; if the beneficiary challenge him to swear, having first himself sworn that he is not acting vexatiously¹; the heir is bound either to declare on oath that he heard no such direction on the part of the testator, or, if he refuse to declare this, must be compelled to execute the trust, whether it be as to the whole estate, or as to some particular article: so that the last wishes of the testator, which have been entrusted to the good faith of his heir, may not be frustrated. We have appointed that the same rules shall also be observed if anything be left as a charge upon a legatee or a beneficiary under a trust. And if the person on whom the gift is said to have been charged, admit that something was charged upon him, but take refuge in legal subtleties², he is in all cases to be compelled to pay.

TIT. XXIV. ON PARTICULAR ARTICLES LEFT IN TRUST.

A man can also leave individual things by way of trust, as a field, a slave, a garment, silver plate, coin; and can ask either the heir himself or a legatee to deliver it over to a third party, although a legacy cannot be charged upon a

¹ The oath *de calumnia* had to be taken by plaintiffs in all suits.
IV. 16. 1.

² Sc. take advantage of some defect of form in the gift.

vel legatarium, quamvis a legatario legari non possit¹. (1.) Potest autem non solum proprias testator res per fideicommissum relinquere, sed et heredis aut legatarii aut fideicommissarii aut cuiuslibet alterius. itaque et legatarius et fideicommissarius non solum de ea re rogari potest, ut eam alicui restituat, quæ ei relicta sit, sed etiam de alia, sive ipsius sive aliena sit. hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit. nam quod amplius est inutiliter relinquitur². cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est aut ipsam redimere et præstare, aut aestimationem eius solvere.

2. Libertas quoque servo per fideicommissum dari potest, ut heres eum rogetur manumittere, vel legatarius, vel fideicommissarius. nec interest utrum de suo proprio servo testator roget, an de eo qui ipsius heredis aut legatarii vel etiam extranei sit. Itaque et alienus servus redimi et manu-

legatee¹. 1. And a testator can leave not only his own property by way of trust, but the property of his heir or his legatee, or of a beneficiary under his trust, or of any one else. Therefore, not only can a request for redelivery to another be addressed to the legatee or the beneficiary under the trust in respect of the very thing left to him, but also in respect of a different thing, whether it belong to himself or to a stranger; and this only is to be observed, that no one may be asked to deliver over to another more than he himself has taken under the testament; for the request as to the excess is inoperative². So when another person's property is left by trust, it is incumbent on the person requested to deliver it that he either purchase the very thing and hand it over, or that he pay its value.

2. A gift of liberty can also be conferred on a slave by way of trust, in such manner that either the heir or a legatee or a beneficiary may be asked to manumit him: nor does it matter whether the testator make request as to his own slave, or as to one belonging to the heir himself, or to a legatee or even to a stranger: and therefore even a stranger's slave must be bought

¹ Gains II. 260—267, 271; Ulpian XXIV. 20.

² But this rule only applies when the property he is to deliver over is

not his own. If it be his own he is presumed to prefer the inheritance, and the question of value is not considered. D. 40. 5. 24. 12.

mitti debet. quodsi dominus eum non vendat, si modo *nihil* ex iudicio eius qui reliquit libertatem perceperit¹, non statim extinguitur fideicommissaria libertas, sed differtur, quia possit tempore procedente, ubicumque occasio redimendi servi fuerit, praestari libertas². Qui autem ex causa fideicommissi manumittitur, non testatoris fit libertus, etiamsi testatoris servus sit, sed eius qui manumittit. at is qui directo, testamento, liber esse iubetur, ipsius testatoris fit libertus, qui etiam *orcinus* appellatur. nec alius ullus directo, ex testamento, libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo faceret testamentum, et quo moreretur. directo autem libertas tunc dari videtur, cum non ab alio servum manumitti rogat, sed velut ex suo testamento libertatem ei competere vult.

3. Verba autem fideicommissorum haec maxime in usu habentur: peto, rogo, volo, mando, fidei tuae com-

and manumitted. But if the owner will not sell him, supposing, that is, he has received nothing under the testament of the person who confers the gift of freedom¹, the fiduciary gift of liberty is not destroyed at once, but only postponed; because, as time goes on, the freedom may be conferred, whenever there is an opportunity of purchasing the slave². The slave manumitted in accordance with a trust does not become the freedman of the testator, even though he be the testator's slave, but the freedman of the person who manumits him; whilst the slave directly ordered to be free in a testament is a freedman of the testator himself, and is styled *libertus orcinus*. But no one can receive his freedom directly by testament except a slave belonging to the testator at both times, viz. when he made his testament and when he died: and liberty is regarded as directly given when a testator does not ask for the slave to be manumitted by another person, but wills, so to speak, that he shall have liberty by virtue of his own testament.

3. The phraseology usually employed in trust-gifts is as follows: "I beg, I ask, I wish, I charge, I trust to your good

¹ When he has received anything under the testament, he must either sell the slave or renounce his legacy. D. 40. 5. 19. 1.

² It is generally supposed that

the law was different in Gaius' time, but the passage wherein he refers to this point would bear out Justinian's interpretation. See Gaius II. 265.

mitto, quae perinde singula firma sunt, atque si omnia in unum congesta essent¹.

TIT. XXV. DE CODICILLIS.

Ante Augusti tempora constat ius codicillorum in usu non fuisse, sed primus Lucius Lentulus, ex cuius persona etiam fideicommissa coeperunt, codicillos introduxit. nam cum decederet in Africa, scripsit codicillos testamento confirmatos quibus ab Augusto² petiit per fideicommissum, ut faceret aliquid; et cum divus Augustus voluntatem eius implesset, deinceps reliqui³, auctoritatem eius secuti, fideicommissa praestabant, et filia Lentuli legata quae iure non debebat solvit. Dicitur Augustus convocasse prudentes, inter quos Trebatium quoque cuius tunc auctoritas maxima erat, et quaesisse, an posset hoc recipi, nec absonans a iuris ratione codicillorum usus esset; et Trebatium suasisse Augusto, quod diceret utilissimum et necessarium hoc civibus esse, propter magnas et longas peregrina-

faith:" and these words are as binding when used singly, as they are when all united¹.

TIT. XXV. ON CODICILS.

It is well known that the legality of codicils was not established before the time of Augustus, but was brought about by Lucius Lentulus, through whom also trusts originated. For dying in Africa, he left a codicil, confirmed by his testament, in which he begged Augustus² to perform something as a trust: and Augustus having complied with his wishes, the others³ thereupon, following his precedent, paid trust-bequests; and the daughter of Lentulus discharged legacies which by law she did not owe. On this it is said Augustus called together the learned in the law, and amongst them Trebatius, whose opinion then carried the utmost weight; and inquired whether this could be allowed, and whether the employment of codicils was inconsistent with the principles of the law: and Trebatius persuaded Augustus by saying that it was most useful and necessary for the citizens, on account of the numerous and

¹ Gaius II. 249.

² Whom he had appointed heir, Proculus explains.

³ Sc. those persons who were heirs of Lentulus jointly with Augustus.

nationes quae apud veteres fuissent, ubi, si quis testamentum facere non posset, tamen codicillos posset. Post quae tempora, cum et Labeo codicillos fecisset, iam nemini dubium erat, quin codicilli iure optimo admitterentur.

1. Non tantum autem testamento facto potest quis codicillos facere, sed et intestatus quis decedens fideicommittere codicillis potest. Sed cum ante testamentum factum codicilli facti erant, Papinianus ait non aliter vires habere, quam si speciali postea voluntate confirmentur. sed divi Severus et Antoninus rescripserunt¹, ex his codicillis qui testamentum praecedunt posse fideicommissum peti, si appareat eum qui postea testamentum fecerat a voluntate quam codicillis expresserat non recessisse. (2.) Codicillis autem hereditas neque dari neque adimi potest, ne confundantur ius testamentorum et codicillorum, et ideo nec exhereditatio scribi. directo autem hereditas codicillis neque dari neque adimi potest: nam per fideicommissum hereditas codicillis iure relinquitur². nec condicionem

distant journeys which took place amongst the ancients, that when a man could not execute a testament, he should still be able to execute a codicil. After this, when Labeo also had made a codicil, it became admitted on all hands that codicils could be allowed in perfect conformity with law.

1. Not only can a person make a codicil after he has made a testament, but even when dying intestate he can create trusts by a codicil. But when a codicil has been made before the execution of a testament, Papinian holds that it cannot be valid, unless confirmed subsequently by express declaration¹; but the Emperors Severus and Antoninus decided by rescript that a trust could be enforced under a codicil precedent to a testament, if it were proved that the maker of the subsequent testament had not abandoned the wish which he had expressed in the codicil. 2. Still an inheritance can neither be given nor taken away by a codicil, otherwise the force of testaments and codicils would be confounded: and therefore also no disinheritance can be introduced (into a codicil). But it is only directly that an inheritance cannot be given or taken away by a codicil; for it can be lawfully conferred in a codicil by way of trust². Again, by a codicil no condition can be imposed on an

¹ D. 29. 7. 5.

² Gaius II. 273, Ulpian XXV. 11.

heredi instituto codicillis adiicere neque substituere directo potest¹. (3.) Codicillos autem etiam plures quis ~~facere~~ potest; et nullam sollemnitatem ordinationis desiderent².

heir (already) appointed, nor can a direct substitution be ~~made~~¹.
3. A man can make more codicils than one, and they require no special form of execution².

¹ D. 29. 7. 6. pr.

² But a codicil had to be executed in the presence of five witnesses

present together, who were further required to sign it if reduced to writing by the testator. C. 6. 36. 8. 3.

BOOK III.

TIT. I. DE HEREDITATIBUS QUAE AB INTESTATO DEFERENTUR.

Intestatus decedit, qui aut omnino testamentum non fecit, aut non iure fecit, aut id quod fecerat ruptum irritumve factum est¹, aut nemo ex eo heres extitit.

1. Intestatorum autem hereditates ex lege duodecim tabularum primum ad suos heredes pertinent. (2.) Sui autem heredes existimantur, ut et supra diximus², qui in potestate morientis fuerunt: veluti filius filiave, nepos neptisve ex filio, pronepos proneptisve ex nepote ex filio nato prognatus prognatave. Nec interest utrum naturales sint liberi, an adoptivi. Quibus connumerari necesse est etiam eos qui ex legitimis quidem matrimoniis non sunt progeniti, curiis tamen civitatum

TIT. I. ON INHERITANCES WHICH DEVOLVE BY INTESTACY.

A person dies intestate when he has either made no testament at all, or made one not in due form, or when that which he made has become broken or ineffectual¹, or when no one has become heir under it.

1. The inheritances of intestates, by a law of the Twelve Tables, belong in the first place to their *sui heredes*. 2. And, as we have said before², those are accounted *sui heredes* who are under the *potestas* of the dying man; as a son or daughter, a grandson or a granddaughter by a son, a great-grandson or a great-granddaughter sprung from a grandson born from a son: nor does it matter whether they be actual descendants or adopted. With these must also be reckoned those persons who have not been born in lawful wedlock, but yet obtain the rights

¹ For the exact meaning of *non jure factum, ruptum* and *irritum*, see

App. F.

² II. 19. 2.

dati¹ secundum divalium constitutionum quae super his positae sunt tenorem, suorum iura nanciscuntur. nec non eos quos nostrae amplexae sunt constitutiones², per quas iussimus, si quis mulierem in suo contubernio copulaverit, non ab initio affectione maritali, eam tamen cum qua poterat habere coniugium, et ex ea liberos sustulerit, postea vero affectione procedente etiam nuptialia instrumenta cum ea fecerit, filiosque vel filias habuerit: non solum eos liberos qui post dotem editi sunt iustos et in potestate esse patribus, sed etiam anteriores, qui et his qui postea nati sunt occasionem legitimi nominis praestiterunt; quod obtinere censuimus, etiamsi non progeniti fuerint post dotale instrumentum confectum liberi, vel etiam nati ab hac luce subtracti fuerint. Ita demum tamen nepos neptisve et pronepos proneptisve suorum heredum numero sunt, si praecedens persona desierit in potestate parentis esse, sive morte id acciderit sive alia ratione, veluti emancipatione: nam

of *sui heredes*, according to the provisions of certain imperial constitutions enacted on these points, by being presented to the *curiae* of their cities¹: and those, too, whom our own constitutions² comprehend, in which we have ordained that when a person has cohabited with a woman, not originally intending to marry her, although she was a person whom he might marry, and has had children by her, and subsequently from increase of affection has gone through the formalities of marriage with her, and begotten upon her sons or daughters; not only shall those children born after the assignment of the marriage portion be legitimate and under the *potesas* of their father, but those also who were born previously, and who gave occasion to the conference of legitimacy on those born afterwards. And this rule we have ordered to stand good, even though no children were born after the drawing-up of the instrument of dowry, or though such as were born have died. But a grandson or granddaughter and a great-grandson or great-granddaughter are included amongst the *sui heredes* only when the person prior to them in degree has ceased to be under the *potesas* of the ascendant, whether that has happened by death or by some other means, emancipation for instance: for if at the time when a man dies

¹ C. 5. 27. 9. See App. H.

² C. 5. 27. 10 and 11.

si per id tempus quo quis moriatur filius in potestate eius sit, nepos ex eo suus heres esse non potest. idque et in ceteris deinceps liberorum personis dictum intellegimus. Postumi quoque, qui si vivo parente nati essent, in potestate futuri forent, sui heredes sunt. (3.) Sui autem etiam ignorantes fiunt heredes, et licet furiosi sint, heredes possunt existere: quia quibus ex causis ignorantibus acquiritur nobis, ex his causis et furiosis acquiri potest¹. et statim morte parentis quasi continuatur dominium: et ideo nec tutoris auctoritate opus est in pupillis, cum etiam ignorantibus acquiritur suis heredibus hereditas; nec curatoris consensu acquiritur furioso, sed ipso iure. (4.) Interdum autem, licet in potestate mortis tempore suus heres non fuit, tamen suus heres parenti efficitur, veluti si ab hostibus quis reversus fuerit post mortem patris: ius enim postliminii hoc facit². (5.) Per contrarium evenit, ut licet quis in familia defuncti sit mortis tempore, tamen suus heres non

his son be under his *potestas*, the grandson by him cannot be a *suus heres*: and this rule we shall also understand to be laid down with regard to other classes of descendants more remote. After-born descendants also, who, if they had been born in the lifetime of their ascendant, would have been under his *potestas*, are *sui heredes*. 3. *Sui heredes* become heirs even without their knowledge; and although they be insane, they can still be heirs; because in whatever cases acquisition can be made by us without our knowledge, in the selfsame cases can it be made by madmen¹. Further, the ownership is in a manner continued from the very instant of the ascendant's death; and therefore pupils have no need of authorization on the part of their tutor, seeing that an inheritance can be acquired by *sui heredes* even without their knowledge: neither does a madman acquire through the consent of his curator, but by operation of law. 4. Sometimes, too, a child is *suus heres* to his ascendant, although he was not under his *potestas* at the time of his death, as, for instance, when one returns after his father's death from captivity amongst the enemy: for the right of postliminy has this effect². 5. It sometimes happens, on the contrary, that although a person may be a member of the family

¹ This maxim occurs frequently in the Roman law sources, e. g. in D. 12. 1. 12, D. 44. 7. 24. pr.

² This was laid down in the *Lex Cornelia*. See C. 8. 51. 9.

fiat, veluti si post mortem suam pater iudicatus fuerit reus perduellionis, ac per hoc memoria eius damnata fuerit¹: suum enim heredem habere non potest, cum fiscus ei succedit. sed potest dici ipso iure esse suum heredem, sed desinere, (6.) Cum filius filiave, et ex altero filio nepos neptisve extant, pariter ad hereditatem vocantur; nec qui gradu proximior est ulteriorem excludit: aequum enim esse videtur nepotes neptesve in patris sui locum succedere. pari ratione et si nepos neptisve sit ex filio, et ex nepote pronepos proneptisve, simul vocantur². Et quia placuit nepotes neptesve, item pronepotes proneptesve in parentis sui locum succedere: conveniens esse visum est non in capita, sed in stirpes hereditatem dividi, ut filius partem dimidiam hereditatis habeat, et ex altero filio duo pluresve nepotes alteram dimidiam. item si ex duobus filiis nepotes extant, ex altero unus forte aut duo, ex altero tres

of the deceased at the time of the decease, he is still not a *suus heres*; as, for instance, if the father be judged guilty of treason after his death, and so his memory be made infamous¹: for he cannot have a *suus heres*, inasmuch as the *fiscus* succeeds to his estate: but it may be said that in strictness of law there is a *suus heres*, although he loses his rights. 6. When a man leaves behind him a son or daughter, and a grandson or granddaughter by another son, they are called simultaneously to the inheritance, nor does the nearer in degree exclude the more remote: for it seems fair that grandsons and granddaughters should succeed to their father's place. On the like principle, too, if there be a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, they are called simultaneously². And since it has been established that grandsons and granddaughters, as also great-grandsons and great-granddaughters, should succeed to the place of their ascendant, it has seemed consistent that the inheritance should be divided not *per capita*, but *per stirpes*, so that a son should take one-half of the inheritance, and two or more grandsons by another son the other half: also that if there be grandsons by two sons, and from one son one or two perhaps, from the other

¹ Criminal proceedings as a rule could not be instituted or continued after the death of the accused, but treason was an exception. See be-

low IV. 18. 3, also D. 48. 4. 11, D. 48. 19. 20.

² Gaius III. 7.

aut quattuor, ad unum aut ad duos dimidia pars pertinet, ad tres aut ad quattuor altera dimidia¹. (7.) Cum autem quaeritur, an quis suus heres existere potest: eo tempore quaerendum est quo certum est aliquem sine testamento decessisse, quod accidit et destituto testamento. hac ratione, si filius exheredatus fuerit et extraneus heres institutus, et filio mortuo postea certum fuerit heredem institutum ex testamento non fieri heredem, aut quia noluit esse heres, aut quia non potuit, nepos avo suus heres existet: quia, quo tempore certum est intestatum decessisse patremfamilias, solus invenitur nepos. et hoc certum est. (8.) Et licet post mortem avi natus sit, tamen avo vivo conceptus, inortuo patre eius, posteaque deserto avi testamento, suus heres efficitur. Plane si et conceptus et natus fuerit post mortem avi, mortuo patre suo, desertoque postea avi testamento, suus heres avo non existit, quia nullo iure cognationis patrem sui patris tetigit.

three or four, one half should belong to the one or two and the other half to the three or four¹. 7. Now when it is asked whether a certain person can be *suius heres*, we must in our inquiry have regard to the time when it became certain that the deceased died without a testament, which is the case even when there is a testament under which no heir makes claim. According to this principle, if a son be disinherited and a stranger appointed heir, and if after the death of the son it subsequently become certain that the heir appointed in the testament will not be heir, either because he has refused the inheritance, or because he is unable to accept it, the grandson will be *suius heres* to his grandfather: because at the time when it becomes certain that the head of the family has died intestate, the grandson alone is found: and this is a well-established rule. 8. And although the grandson be born after the death of his grandfather, yet if he were conceived in the lifetime of the latter, he will become *suius heres*, supposing his father has died and his grandfather's testament has subsequently been abandoned by the heir. But clearly, if he were both conceived and born after the death of his grandfather, he cannot become *suius heres* in case his father die and his grandfather's testament be subsequently abandoned; because he is connected with his father's father by no tie of relationship.

¹ Gaius III. 8, 16.

sic nec ille est inter liberos avo quem filius emancipatus adoptaverat. hi autem, cum non sunt quantum ad hereditatem liberi, neque bonorum possessionem petere possunt quasi proximi cognati¹.—Haec de suis heredibus.

9. Emancipati autem liberi iure civili nihil iuris habent: neque enim sui heredes sunt, quia in potestate esse desierunt parentis, neque alio ullo iure per legem duodecim tabularum vocantur. Sed Praetor, naturali aequitate motus, dat eis bonorum possessionem unde liberi, perinde acsi in potestate parentis mortis tempore fuissent; sive soli sint sive cum suis heredibus concurrant. itaque duobus liberis extantibus, emancipato et qui mortis tempore in potestate fuerit: sane quidem is qui in potestate fuerit solus iure civili heres est, id est solus suus heres est; sed cum emancipatus beneficio Praetoris in partem admittitur, evenit, ut suus heres pro parte heres fiat². (10.) At hi qui emancipati a parente in adoptionem se dederunt non admittuntur ad bona naturalis patris quasi liberi, si modo,

And so too a person adopted by an emancipated son is not one of the descendants of the grandfather. These persons, moreover, besides not being descendants so as to inherit, cannot even sue for possession of the goods in the capacity of nearest relations¹. Thus much concerning *sui heredes*.

9. Emancipated descendants have no right of succession under the civil law: for they are not *sui heredes*, inasmuch as they have ceased to be under the *potestas* of their ascendants; and they are not called in under any other title according to the law of the Twelve Tables: but the Praetor, in obedience to natural equity, allows them possession of the goods "on the score of descent" (*unde liberi*), in like manner as if they had been under the *potestas* of their ascendant at the time of his death, whether they exist alone or simultaneously with *sui heredes*. Hence if there be left two descendants, one emancipated and one under *potestas* at the time of the ascendant's death, it is perfectly clear that the one who was under *potestas* is the sole heir by the civil law; in other words he is the only *sui heres*: but since the emancipated one is admitted to a half by the aid of the Praetor, the result is that the *sui heres* is only heir to the other half². 10. But those who have given themselves in adoption after being emancipated by their ascendant are not allowed to possess the goods of their natural

¹ See III. 9. 3 and 4.

² Gaius III. 19, 25, 26.

cum is moreretur, in adoptiva familia sint. nam vivo eo emancipati ab adoptivo patre perinde admittuntur ad bona naturalis patris, acsi emancipati ab ipso essent, nec umquam in adoptiva familia fuissent; et convenienter, quod ad adoptivum patrem pertinet, extraneorum loco esse incipiunt. post mortem vero naturalis patris emancipati ab adoptivo, et quantum ad hunc, aequae extraneorum loco fiunt, et quantum ad naturalis parentis bona pertinet, nihilo magis liberorum gradum nanciscuntur: quod ideo sic placuit, quia iniquum erat esse in potestate patris adoptivi, ad quos bona naturalis patris pertinerent, utrum ad liberos eius, an ad agnatos. (II.) Minus ergo iuris habent adoptivi quam naturales. namque naturales emancipati beneficio Praetoris gradum liberorum retinent, licet iure civili perdunt; adoptivi vero emancipati et iure civili perdunt gradum liberorum, et a Praetore non adiuvantur. et recte: naturalia enim iura civilis ratio perimere non potest¹; nec quia desinunt

parent on the score of descent, supposing at his death they are still in the adopting family: although, if they have been emancipated by their adopting father in the lifetime of their actual father, they are admitted to possession of the goods of the latter, in like manner as if they had been emancipated by him and never passed into an adoptive family: and consequently, so far as the adopting father is concerned, they begin to be in the position of strangers. But if emancipated by the adopter after the death of their actual father, they are as in the other case strangers in regard of the former, and besides they do not regain the position of descendants in relation to the goods of their actual ascendant: a rule which has been so laid down because it would be inequitable that it should be in the power of the adopting father to decide on whom the goods of the actual father are to devolve, i.e. whether on his descendants or his agnates. II. Adopted descendants, therefore, have smaller rights than actual descendants: for actual descendants who have been emancipated retain their position as descendants through the Praetor's aid, although they lose it by the civil law; whereas adopted descendants after being emancipated both lose their position as descendants by the civil law and are not assisted by the Praetor; and properly so, for an institution of civil origin cannot destroy natural rights¹, nor can persons possibly cease to

¹ I. 15. 3.

sui heredes esse, desinere possunt filii filiaeve aut nepotes neptesve esse; adoptivi vero emancipati extraneorum loco incipiunt esse, quia ius nomenque filii filiaeve quod per adoptionem consecuti sunt alia civili ratione, id est emancipatione perdunt. (12.) Eadem haec observantur et in ea bonorum possessione quam contra tabulas testamenti parentis¹ liberis praeteritis, id est neque heredibus institutis, neque ut oportet exheredatis, Praetor pollicetur. nam eos quidem qui in potestate parentis mortis tempore fuerunt et emancipatos vocat Praetor ad eam bonorum possessionem; eos vero qui in adoptiva familia fuerunt per hoc tempus quo naturalis parens moreretur repellit. item adoptivos liberos emancipatos ab adoptivo patre, sicut ab intestato, ita longe minus contra tabulas testamenti ad bona eius admittit, quia desinunt in liberorum numero esse. (13.) Admonendi tamen sumus eos qui in adoptiva familia sunt, quive post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente

be sons or daughters, or grandsons or granddaughters, by ceasing to be *sui heredes*: but adopted children, when emancipated, become at once in the position of strangers, because that right and title of son or daughter which they obtained by adoption they lose by another institution of the civil law, namely, emancipation. 12. The above rules are also observed in that possession of goods which the Praetor promises in contravention of the provisions of the testament of an ancestor¹ to descendants who have been passed over, i.e. who have neither been appointed heirs nor disinherited in proper form: for the Praetor calls to this possession of the goods both those who were under the *potestas* of the ascendant at the time of his death, and those who have been emancipated: whilst he rejects those who were in an adoptive family at the time when the actual ascendant died. So too, as he refuses to admit on an intestacy adopted descendants who have been emancipated by their adopting father, still less does he call in such persons to the father's property in contravention of the provisions of his testament: because they cease to be in the category of descendants. 13. We must, however, take note that descendants who are in an adoptive family, or who have been emancipated by an adopting father after the death of their actual father, although not admitted in case of the death of the latter,

¹ III. 9. 3.

naturali mortuo, licet ea parte edicti qua liberi ad bonorum possessionem vocantur non admittantur, alia tamen parte vocari, id est qua cognati defuncti vocantur. ex qua parte ita admittuntur, si neque sui heredes liberi, neque emancipati obstant, neque agnatus quidem ullus interveniat: ante enim Praetor liberos vocat tam suos heredes quam emancipatos, deinde legitimos heredes¹, deinde proximos cognatos. (14.) Sed ea omnia antiquitati quidem placuerunt: aliquam autem emendationem a nostra constitutione² acceperunt quam super his personis posuimus quae a patribus suis naturalibus in adoptionem aliis dantur. Invenimus etenim nonnullos casus in quibus filii et naturalium parentum successionem propter adoptionem amittebant, et adoptione facile per emancipationem soluta, ad neutrius patris successionem vocabantur. Hoc solito more corrigentes, constitutionem scripsimus per quam definivimus, quando parens naturalis filium suum adoptandum alii dederit, integra omnia iura ita servari, atque si in patris naturalis potestate permansisset, nec penitus adoptio fuerit sub-

under that section of the edict whereby descendants are called to the possession of the goods, are nevertheless admitted under another section, namely, that whereby cognates of the deceased are called in. Under which section, however, they are only admitted when no descendants, whether *sui heredes* or emancipated, and no other agnates stand before them: for the Praetor first summons descendants, both *sui heredes* and emancipated, then *legitimi heredes*¹, then the nearest *cognati*. 14. But all the above rules were approved in ancient times only, and have received improvement by a constitution of our own², which we have issued with reference to those persons who are given in adoption to others by their actual parents: for we have seen some cases in which sons have not only lost through adoption their right of succeeding to their actual ascendants, but (since adoption is easily set aside by emancipation) have been called to the succession of neither ascendant. Correcting this, after our usual fashion, we have drawn up a constitution, in which we have laid down that when an actual parent has given his son in adoption to another, all the son's rights shall be maintained intact, just as though he had remained under the *potestas* of his actual father and no adoption had taken place at

¹ III. 9. 3.² C. 8. 48. 10.

secuta; nisi in hoc tantummodo casu, ut possit ab intestato ad patris adoptivi venire successionem. testamento autem ab eo facto, neque iure civili neque praetorio aliquid ex hereditate eius persequi potest, neque contra tabulas bonorum possessione agnita, neque inofficiosi querela instituta¹, cum nec necessitas patri adoptivo imponitur vel heredem cum instituere vel exheredatum facere, utpote nullo naturali vinculo copulatum. neque si ex Sabiniano senatusconsulto² ex tribus maribus fuerit adoptatus: nam et in huiusmodi casu neque quarta ei servatur, nec ulla actio ad eius persecutionem ei competit. nostra autem constitutione exceptus est is quem parens naturalis adoptandum suscepit: utroque enim iure, tam naturali quam legitimo, in hanc personam concurrente, pristina iura tali adoptione servavimus, quemadmodum si paterfamilias sese dederit arrogan-

all, save only in this one respect, that he may succeed to the adopting father in case of his intestacy. But if the latter make a testament, the adopted son can neither by the civil nor the praetorian law obtain any part of his inheritance, whether by claiming possession of the goods in contravention of the testament, or by setting up a *querela inofficiosi*¹; because no obligation is laid on the adopting father either to institute him heir or to disinherit him, seeing that he is not united to such father by any natural tie, not even when one out of three male children has been adopted according to the provisions of the *Senatusconsultum Sabinianum*²: for even in the last-named case, the fourth of the estate is not retained for his benefit, nor does any action lie on his behalf for its recovery. But from the operation of our constitution is excepted any one whom an actual ascendant has taken in adoption: for as both rights, viz. the natural and the legal, unite in such person's favour, we have upheld the old rules in this kind of adoption, just as we have when the head of a family allows himself to be arrogated: and

¹ II. 18.

² Nothing whatever is known of this S.C. beyond what is mentioned here and in the law of which the present passage is an abstract, C. 8. 48. 10. 3. The *quarta legitima* was due to an adopted son (prior to Justinian's legislation) whether he were one of three brothers or not. But it may be that *unus ex tribus*

maribus when adopted and subsequently manumitted had in early times some claims on his adopted father, contrary to the usual rule, and that the words "neque quarta ei servatur" relate to an alteration made by Justinian. The commentary of Theophilus on the passage does little to enlighten us.

dum. quae specialiter et singillatim ex praefatae constitutionis tenore possunt colligi.

15. Item vetustas, ex masculis progenitos plus diligens, solos nepotes vel neptes qui quaeve ex virili sexu descendunt ad suorum vocabat successionem, et iuri agnatorum eos anteponebat; nepotes autem qui ex filiabus nati sunt et pronepotes ex neptibus cognatorum loco numerans, post agnatorum lineam eos vocabat, tam in avi vel proavi materni quam in aviae vel proaviae, sive paternae sive maternae, successionem. Divi autem Principes¹ non passi sunt talem contra naturam iniuriam sine competenti emendatione relinquere: sed cum nepotis et pronepotis nomen commune est utrisque qui tam ex masculis quam ex feminis descendunt, ideo eundem gradum et ordinem successionis eis donaverunt; sed ut aliquid amplius sit eis qui non solum naturae, sed etiam veteris iuris suffragio muniuntur, portionem nepotum et neptum vel deinceps, de quibus supra diximus², paulo minuendam esse existi-

these regulations may be gathered specially and in detail from the wording of the constitution above referred to.

15. The ancients, moreover, in their preference for the offspring of males, called to the succession as *sui heredes* those grandchildren only, whether male or female, who trace through the male line, and made them rank before the *agnati*; but reckoning grandsons born from daughters, and great-grandsons born from granddaughters, in the class of *cognati*, ranged them after the line of the *agnati*, both in the succession to their maternal grandfather or great-grandfather, and in that to their grandmother or great-grandmother either paternal or maternal. But the divine emperors¹ could not tolerate such a wrong to nature without providing a fitting remedy; and as the name of grandson or great-grandson is common alike to descendants through males and through females, they have therefore conferred upon them an equal degree and rank in the succession. Still, in order that some advantage may remain with those who are supported not only by the voice of nature but by that of the ancient law as well, they judged it right that the share of those grandsons, granddaughters and others more remote whom we have named above², should suffer a small deduction; so that they should

¹ Valentinianus, Theodosius and Arcadius. C. 6. 55. 9.

² Sc. those tracing through a female.

naverunt, ut minime tertiam partem acciperent, quam mater eorum vel avia fuerat acceptura: vel pater eorum, vel avus paternus sive maternus, quando femina mortua sit cuius de hereditate agitur, hisque, licet soli sint, *adventibus*², agnatos minime vocabant. et quoniammaxima lex duodecim tabularum, filio mortuo, nepotes vel nepotes, pronepotes vel proneptes in locum patris sui ad successionem avi vocat: ita et principalis dispositio in locum matris suae vel aviae eos cum iam designata partis tertiae diminutione vocat. (16.) Sed nos, cum adhuc dubitatio manebat inter agnatos et memoratos nepotes, partem quantum defuncti substantiae agnatis sibi vindicantibus ex cuiusdam constitutionis auctoritate³: memoratum quidem constitutionem a nostro codice segregavimus, neque inseri eam ex Theodosiano codice in eo concessimus. nostra autem con-

receive one-third less than their mother or grandmother would have received; or than their father or paternal or maternal grandfather would have received¹ in the case where the deceased, for whose inheritance a claim is made, is a woman; and when such persons entered on the inheritance², even if they did so alone, the emperors did not call in the *agnati*. And in like manner as a law of the Twelve Tables, in case a son be dead, calls in the grandsons or granddaughters, great-grandsons or great-granddaughters to take the place of the father in the succession; so also the imperial enactment calls in the same persons to take the place of their mother or grandmother, subject to the above-named deduction of one third part. 16. But as there still remained a point of dispute between the agnates and the grandchildren just mentioned, the agnates claiming for themselves a fourth of the property of the deceased by virtue of a certain constitution³, we have removed that constitution from our code, and have not allowed it to be imported thereinto from the Theodosian code. And in a constitution,

¹ By virtue of the S.C. Orphitianum: see III. 4.

² These words *his adventibus* imply that the constitution did not compel them to accept the position of heirs. *Sui heredes* were always *necessarii*, although they had the *beneficium abstinendi*, II. 19. 2; but

those to whom the rights of *sui heredes* were tendered by praetorian or imperial legislation could always exercise their own discretion as to claiming the *patresfamilias bonorum*.

³ Of this constitution nothing further is known.

stitutione promulgata¹, toti iuri eius derogatum est; et sanximus talibus nepotibus ex filia vel pronepotibus ex nepte et deinceps superstitibus agnatos nullam partem mortui successionis sibi vindicare, ne hi qui ex transversa linea veniunt potiores his habeantur qui recto iure descendunt². quam constitutionem nostram obtinere secundum sui vigorem et tempora et nunc sancimus³: ita tamen, ut quemadmodum inter filios et nepotes ex filio antiquitas statuit, non in capita, sed in stirpes dividi hereditatem, similiter nos inter filios et nepotes ex filia distributionem fieri iubemus, vel inter omnes nepotes et neptes et alias deinceps personas, ut utraque progenies matris suae vel patris, aviae vel avi portionem sine ulla deminutione consequantur, ut si forte unus vel duo ex una parte, ex altera tres aut quattuor extent, unus aut duo dimidiam, alteri tres aut quattuor alteram dimidiam hereditatis habeant.

which we ourselves have published¹, we have entirely abolished the rule above referred to, and have decreed that the agnates shall not claim any portion in the succession of a deceased person when there exist such grandchildren by a daughter, or great-grandchildren by a granddaughter, or other descendants of more remote degree; to the intent that those who are related collaterally may not be preferred to descendants in the direct line². Which constitution of ours we do now also enact shall be in force according to its provisions and date³: in such wise, nevertheless, that just as the ancient rule established that an inheritance should be divided between sons and grandsons by a son not *per stirpes*, but *per capita*, so do we order that the distribution shall be made between sons and grandsons by a daughter, or between grandsons and granddaughters claiming alone, or between other descendants more remote, in such wise that each stock shall receive the share of their mother, father, grandmother or grandfather without any deduction; and hence if there be, for example, one or two of one stock, and three or four of another, the one or two shall take a half of the inheritance and the three or four the other half.

¹ C. 6. 55. 12.

² Hence we perceive that the third is not deducted from descendants through females, except when they claim concurrently with descendants

through males.

³ This refers to the concluding words of the constitution, in which it is declared that it is to have no retrospective effect.

TIT. II. DE LEGITIMA AGNATORUM SUCCESSIONE.

Si nemo suus heres, vel eorum quos inter suos heredes Praetor vel constitutiones vocant, extat, et qui successionem quoquo modo amplectatur: tunc ex lege duodecim tabularum¹ ad agnatum proximum hereditas pertinet. (1.) Sunt autem agnati, ut primo quoque libro tradidimus², cognati per virilis sexus personas cognatione iuncti, quasi a patre cognati. itaque eodem patre nati fratres agnati sibi sunt, qui et consanguinei vocantur, nec requiritur an etiam eandem matrem habuerint. item patruus fratris filio et invicem is illi agnatus est. eodem numero sunt fratres patruales, id est qui ex duobus fratribus procreati sunt, qui etiam consobrini vocantur. qua ratione etiam ad plures gradus agnationis pervenire poterimus. Hi quoque qui post mortem patris nascuntur iura consanguinitatis nanciscuntur. (2.) Non tamen omnibus simul agnatis dat lex

TIT. II. ON THE STATUTORY SUCCESSION OF THE AGNATES.

If there be no *sui heres*, nor any of those persons whom the Praetor or the constitutions call simultaneously with *sui heredes*, to take the succession in any way; then by virtue of a law of the Twelve Tables¹ the inheritance devolves upon the nearest agnate. 1. And agnates, as we have explained in the first book², are those cognates who are united in relationship through persons of the male sex, i.e. cognates by the father's side: hence brothers having the same father are agnates, and are also called *consanguinei*, nor is it a matter of inquiry whether they have the same mother as well. Likewise, a father's brother is agnate to his brother's son, and conversely the latter to the former. In the same category are *fratres patruales*, i.e. the sons of two brothers; who are also called *consobrini*: and on this principle we may trace out further degrees of agnation. Those children, too, who are born after the death of their father obtain the rights of consanguinity. 2. The law, however, does not give the inheritance to all the agnates simultaneously, but

¹ Tab. V. l. 4.² l. 15. l.

hereditatem, sed his qui tunc proximio gradu sunt, cum certum esse coeperit aliquem intestatum decessisse. Per adoptionem quoque agnationis ius consistit, veluti inter filios naturales, et eos quos pater eorum adoptavit (nec dubium est quin proprie¹ consanguinei appellantur); item si quis ex ceteris agnatis, veluti frater, aut patruus, aut denique is qui longiore gradu est, aliquem adoptaverit, agnatos inter suos esse non dubitatur. (3.) Ceterum inter masculos quidem agnationis iure hereditas etiam longissimo gradu ultro citroque capitur. Quod ad feminas vero, ita placebat, ut ipsae consanguinitatis iure tantum capiant hereditatem, si sorores sint, ulterius non capiant; masculi vero ad earum hereditates, etiamsi longissimo gradu sint, admittantur². qua de causa fratris tui aut patris tui filiae, vel amitae tuae hereditas ad te pertinet, tua vero ad illas non pertinebat. quod ideo ita constitutum erat, quia commodius videbatur ita iura constitui, ut plerumque hereditates ad masculos

to those only who are in the nearest degree when it becomes certain that a man has died intestate. The right of agnation is also created by adoption, for instance, between actual sons and those whom their father has adopted: and there is no doubt that such are properly¹ styled *consanguinei*. So, too, if any of a man's other agnates, his brother, for instance, or his father's brother, or even a person of more remote degree, adopt any one, it is indisputable that they become his agnates. 3. But amongst males alone can an inheritance be taken, by right of agnation, upwards and downwards to the very remotest degree: for where females are concerned it used to be the rule that they may take an inheritance by right of consanguinity only when they are sisters, and not when of more remote degree; though males are admitted to their inheritances even if of the most distant blood². Therefore the inheritance of a daughter of your brother or of your uncle, or of your father's sister, devolves upon you, but your inheritance used not to devolve upon them: a principle so laid down because it seemed most expedient that the rule should be for inheritances in general to

¹ Another reading is *improprie*: but if we suppose Justinian to be speaking rather of law than grammar, *proprie* is undoubtedly the cor-

rect version; and the authority of the best MSS. is in its favour.

² Gaius III. 14.

confluerent. sed quia sane iniquum erat in universum eas quasi extraneas repelli, Praetor eas ad bonorum possessionem admittit ea parte qua proximitatis nomine bonorum possessionem pollicetur¹; ex qua parte ita scilicet admittuntur, si neque agnatus ullus nec proximior cognatus interveniat. Et haec quidem lex duodecim tabularum nullo modo introduxit, sed simplicitatem legibus amicam amplexa, simili modo omnes agnatos, sive masculos sive feminas, cuiuscumque gradus, ad similitudinem suorum invicem ad successionem vocabat²; media autem iurisprudentia, quae erat lege quidem duodecim tabularum iunior, imperiali autem dispositione anterior, subtilitate quadam excogitata praefatam differentiam inducebat, et penitus eas a successione agnatorum repellebat, omni alia successione incognita, donec Praetores paulatim asperitatem iuris civilis corrigentes, sive quod deest adimplentes, humano proposito

pass into the hands of males. But since it was clearly inequitable that such women should in all cases be passed over as though they were strangers, the Praetor admits them to possession of the goods under the section (of his edict) wherein he grants possession of goods on the score of proximity¹: though still they are admitted under that section only when there is no agnate and no cognate of nearer degree standing before them. Yet the law of the Twelve Tables by no means laid down such rules, but aiming at the simplicity which is proper to laws, it summoned to a reciprocal succession all agnates, whether male or female, of any degree whatever, in the same manner as *sui heredes*². But intermediate jurisprudence, subsequent to the law of the Twelve Tables and precedent to the imperial constitutions, with refined subtlety introduced this difference, and rejected women entirely from the succession of their agnates: no other right of succession being known, until the Praetors, gradually correcting the unfairness of the civil law or filling up its deficiencies, added through charitable purpose

¹ III. 9. 3.

² Gaius says the contrary, III. 23; and we can only harmonize the statements of Justinian and the older writer by supposing that Justinian is speaking of the actual wording of the law, Gaius of the interpretation

which early jurists put upon its scanty provisions. The statement of Paulus, that *consanguinei* were not reckoned amongst the agnates, supports this explanation. See Paulus S. R. 4. 8. 3.

aliud ordinem suis edictis addiderunt, et cognationis linea proximitatis nomine introducta per bonorum possessionem eas adiuuabant, et pollicebantur his bonorum possessionem quae unde cognati appellatur. nos vero, legem duodecim tabularum sequentes et eius vestigia in hac parte conservantes, laudamus quidem Praetores suae humanitatis, non tamen eos in plenum causae mederi invenimus: quare etenim, uno eodemque gradu naturali concurrente, et agnationis titulis tam in masculis quam in feminis aequa lance constitutis, masculis quidem dabatur ad successionem venire omnium agnatorum, ex agnatis autem mulieribus nullis penitus, nisi soli sorori, ad agnatorum successionem patebat aditus? ideo in plenum omnia reducentes et ad ius duodecim tabularum eandem dispositionem exaequant, nostra constitutione¹ sanximus omnes legitimas personas, id est per virilem sexum descendentes, sive masculini sive feminini generis sunt, simili modo ad iura successionis legitimae² ab intestato vocari secundum gradus sui

another class in their edicts; and after introducing the line of cognates on the score of their proximity, assisted women by a grant of possession of the goods, and promised them that variety of the same which is called *unde cognati*. But we, following out the law of the Twelve Tables, and as to this matter treading in its footsteps, applaud the Praetors for their fair-dealing, and yet do not think they entirely remedied the matter: for when the natural relationship is the same for both, and the name of agnate is given to males and females indiscriminately, why should males be allowed to succeed to the inheritance of any agnates whatsoever, and yet entry upon the succession of agnates be closed against all female agnates except a sister only? Hence, bringing the whole of the rules back to their original, and making the arrangement accord with the law of the Twelve Tables, we have ordained by a constitution of ours¹ that all *legitimae personae*, i.e. all descendants through the male sex, whether male or female, shall be called equally to the rights of a statutory² succession on intestacy, according to their priority of degree; and shall not be excluded because

¹ C. 6. 58. 14.

² *Legitima* or statutory, because

laid down by the law of the XII, Tables,

praerogativam : nec ideo excludendas, quia consanguinitatis iura sicuti germanae¹ non habent. (4.) Hoc etiam addendum nostrae constitutioni existimavimus, ut transferatur unus tantummodo gradus a iure cognationis in legitimam successionem, ut non solum fratris filius et filia, secundum quod iam definivimus, ad successionem patrui sui vocentur, sed etiam germanae consanguineae vel sororis uterinae filius et filia soli, et non deinceps personae una cum his² ad iura avunculi sui perveniant, et mortuo eo qui patruus quidem est fratris sui filius, avunculus autem sororis suae soboli, simili modo ab utroque latere succedant, tamquam si omnes ex masculis descendentes legitimo iure veniant, scilicet ubi frater et soror superstites non sunt. his etenim personis praecedentibus, et successionem admittentibus, ceteri gradus remanent penitus semoti, videlicet hereditate non ad stirpes, sed in capita dividenda. (5.) Si plures sint gradus agnatorum, aperte lex

they have not the right of consanguinity which sisters possess¹. 4. We have also thought fit to add to our constitution that one degree, and only one, shall be introduced from the cognate class into the statutory succession : namely, that not only the son or daughter of a brother, according to our rule above, shall be called to the succession of the paternal uncle ; but that the son or daughter (these persons alone, and none below them) of a sister by the same father, or by the same mother, shall succeed together with those just named² to the property of their maternal uncle : and that when a person dies who is paternal uncle to his brother's sons and maternal uncle to the children of his sister, those of either branch shall succeed in like manner, just as though they all came in by statutory right as descendants through males ; taking for granted, of course, that no brother or sister is alive. For if the last-named persons, having the prior claim, accept the inheritance, the lower degrees are altogether excluded ; because the inheritance is to be divided not *per stirpes* but *per capita*. 5. When there are agnates of various degrees, the law of the Twelve Tables expressly calls

¹ *Germana* = a sister of the whole blood, or at any rate having the same father = *consanguinea*. See Fes-

tus, sub verb. *germen*.

² Sc. the *fratres patruales*.

duodecim tabularum proximum¹ vocat: itaque si verbi gratia sit frater defuncti, et alterius fratris filius, aut patruus, frater potior habetur. et quamvis singulari numero usa lex proximum vocet: tamen dubium non est, quin et si plures sint eiusdem gradus, omnes admittantur: nam et proprie proximus ex pluribus gradibus intellegitur, et tamen dubium non est quin, licet unus sit gradus agnatorum, pertineat ad eos hereditas. (6.) Proximus autem, si quidem nullo testamento factō quisque decesserit, per hoc tempus requiritur quo mortuus est is cuius de hereditate quaeritur. quodsi factō testamento quisquam decesserit, per hoc tempus requiritur quo certum esse coeperit nullum ex testamento heredem extaturum: tunc enim proprie quisque intellegitur intestatus decessisse. quod quidem aliquando longo tempore declaratur: in quo spatio temporis saepe accidit, ut proximior mortuo proximus esse incipiat, qui moriente testatore non erat proximus². (7.) Pla-

in the nearest¹. If therefore, as an example, there be a brother of the deceased and the son of another brother or a paternal uncle, the brother is preferred. And although the law uses the singular number when calling "the nearest," still there is no doubt that if there be several of equal degree, all are to be admitted: for although, strictly speaking, "the nearest" means the nearest of several degrees, yet if there be but one degree of agnates, the inheritance goes to them (all). 6. When a man dies without having made any testament, that agnate is looked for who was nearest at the time of the death of the person whose inheritance is in dispute. But when a man dies after making a testament, that one is looked for who was nearest at the time it became certain that no person would be heir under the testament: for it is then that the man is fairly understood to have died intestate. And this in some cases is not made apparent for a long time; during which interval it often happens that through the death of a nearer agnate one becomes nearest who was not so at the testator's death². 7. It used also

¹ "Si ab intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto, Tab. v. l. 4.

² Gaius III. 13. When there was no devolution (see next paragraph), it was most important to fix the

vesting instant as late as possible: otherwise the nearest agnate at the time of death might die before he could make entry, and then the inheritance would pass to the cognates.

cebat autem in eo genere percipiendarum hereditatum successionem non esse¹, id est ut, quamvis proximus qui secundum ea quae diximus vocatur ad hereditatem, aut spreverit hereditatem, aut antequam adeat decesserit, nihilo magis legitimo iure sequentes admittuntur. quod iterum Praetores, imperfecto iure corrigentes, non in totum sine adminiculo relinquebant, sed ex cognatorum ordine eos vocabant, utpote agnationis iure eis recluso. sed nos nihil deesse perfectissimo iuri cupientes, nostra constitutione² sanximus, quam de iure patronatus humanitate suggerente protulimus, successionem in agnatorum hereditatibus non esse eis denegandam, cum satis absurdum erat, quod cognatis a Praetore apertum est, hoc agnatis esse reclusum, maxime cum in onere quidem tutellarum et primo gradu deficiente sequens succedit, et quod in onere obtinebat, non erat in lucro permissum³.

8. Ad legitimam successionem nihilominus vocatur etiam

to be the law that there was no devolution in this class of inheritances¹, that is to say, that if the nearest agnate, who, according to what we have already stated, is called to take the inheritance, declined it or died before entry, those of lower degree were not admitted thereto of statutory right. Here again the Praetors, though correcting in an imperfect manner, did not leave the case altogether unamended, but called such persons as cognates, since their title as agnates was defeated. But we, desiring that there should be no want of perfection in the law, have ordained by a certain constitution, which we published on the right of patronage² (being moved so to do by a regard for equity), that devolution in the inheritances of agnates shall not be forbidden: for it was thoroughly absurd that a right thrown open to cognates by the Praetor should be denied to agnates; especially as the remoter degree succeeds to the burden of tutelage in case of the failure of the higher degree, and so what was allowed in the case of a burden was withheld in the case of a benefit³.

8. An ascendant also is called to a statutory succession

¹ Gaius III. 12: Paulus S. R. IV. 8, 23, Ulp. XXVI. 5.

² C. 6. 4. 4, of which only a few fragments remain.

³ I. 17. pr.

parens qui contracta fiducia¹ filium vel filiam, nepotem vel neptem, ac deinceps emancipat. quod ex nostra constitutione² omnimodo inducitur, ut emancipationes liberorum semper videantur contracta fiducia fieri; cum apud antiquos non aliter hoc obtinebat, nisi specialiter contracta fiducia parens manumisisset.

TIT. III. DE SENATUSCONSULTO TERTULLIANO.

Lex duodecim tabularum ita stricto iure utebatur, et praeponerebat masculorum progeniem, et eos qui per feminini sexus

when he emancipates his son, daughter, grandson, grand-daughter or other descendants under a fiduciary agreement¹. Which agreement by a constitution of ours² is implied in all cases; so that the emancipations of descendants are always considered to be under fiduciary compact: although in ancient times this was not so, unless the ascendant had manumitted under fiduciary agreement expressly stated.

TIT. III. ON THE SENATUS CONSULTUM TERTULLIANUM.

The law of the Twelve Tables laid down so strict a rule, giving such preference to the offspring of males and so utterly

¹ *Fiducia*, in its general signification, is a pact attached to a conveyance by *mancipatio* or *in jure cessio*, whereby the recipient of the thing or person transferred bound himself to restore it on demand. See Dirksen, sub verb. § 2; Savigny *On Possession*, p. 216: Cic. *pro Flacco*, 21.

The ancient form of emancipation is described by Gaius (L. 132), and we perceive that two persons in addition to the actual parent took part in the process. There was, firstly, the purchaser, who bought the son from his father as though he were a slave, and thereupon held him in the quasi-servile status called *mancipium*; secondly, there was the plaintiff in the *cessio in jure*, who acted as *adsertor libertatis* and reclaimed from slavery the person whom he feigned to be his son, thereby reestablishing over him *patria potestas*. Then followed the

manumission by this second party, or more generally by the actual father after a fresh transfer of *potestas*. But this transfer took place only if there had been a fiduciary agreement expressly made. The manumitter, whether stranger or parent, was a quasi-patron; and his successory rights were the same as those of the actual patron of an emancipated slave.

Why the parent had to part with his *potestas* and resume it before emancipating is not explained, and we can only suppose that there was some technical rule allowing an adopting father alone, and not an actual one, to abandon his parental rights, so that the fictitious sale and suit, followed by the transfer of *potestas*, had to take place in order that the father might hold in adoption his own son.

² C. 8. 49. 6.

necessitudinem sibi iunguntur adeo expellebat, ut ne quidem inter matrem et filium filiamve ultro citroque hereditatis capiendae ius daret¹, nisi quod Praetores ex proximitate cognatorum eas personas ad successionem, bonorum possessione unde cognati accommodata, vocabant. (1.) Sed hae iuris angustiae postea emendatae sunt. Et primus quidem divus Claudius matri ad solatium liberorum amissorum legitimam² eorum detulit hereditatem. (2.) Postea autem *senatusconsulto Tertulliano* quod divi Hadriani³ temporibus factum est plenissime de tristi successione matri, non etiam aviae, deferenda cautum est: ut mater ingenua trium liberorum ius⁴ habens, libertina quatuor, ad bona filiorum filiarumve admittatur intestatorum mortuorum, licet in potestate parentis est, ut

excluding persons related one to another through females, that it did not even allow the right between mother and son of a reciprocal succession¹: although the Praetors called in such persons, according to their proximity as cognates, by the possession of goods designated *unde cognati*. 1. These restrictions of the law were, however, afterwards relaxed, and the late emperor Claudius was the first to confer on the mother a statutory² succession to her children as a consolation for their loss. 2. Afterwards by the *senatusconsultum Tertullianum*, enacted in the time of the late emperor Hadrian³, comprehensive regulations were made for this sad succession being conferred on a mother, although not on a grandmother: in such wise that a freeborn mother having the right derived from three children, or a freedwoman having that derived from four⁴, should be admitted, even though she were under the *potestas* of another person, to the inheritance of sons or daughters who died intestate: provided only that when she was under another

¹ Gaius III. 24, 25.

² *Statutory* in contradistinction to *praetorian*, which mothers already possessed. We have no record of the enactment of Claudius.

³ As Gaius makes no mention of this *senatusconsultum*, there is plausibility in the hypothesis that Antoninus Pius is the Hadrian here spoken of. Schrader, however, maintains that the veritable Hadrian is meant,

and that Gaius did not allude to the enactment, because it dealt with a matter of detail, and so reference to it was out of place in his elementary treatise.

⁴ The *jus liberorum* was an invention of the Lex Papia Poppoea; the provisions of which are stated at length in App. (G.) to our edition of Gaius.

scilicet, cum alieno iuri subiecta est, iussu eius adeat cuius iuri subiecta est. (3.) Praeferuntur autem matri liberi defuncti, qui sui sunt quive suorum loco¹, sive primi gradus sive ulterioris. sed et filiae suae mortuae filius vel filia opponitur ex constitutionibus² matri defunctae, id est aviae suae. pater quoque utriusque, non etiam avus vel proavus, matri antepositur, scilicet cum inter eos solos de hereditate agitur³. frater autem consanguineus tam filii quam filiae excludebat matrem; soror autem consanguinea pariter cum matre admittebatur: sed si fuerat frater et soror consanguinei, et mater liberis honorata, frater quidem matrem excludebat, communis autem erat hereditas ex aequis partibus fratri et sorori. (4.) Sed nos constitutione⁴ quam in codice nostro nomine decorato posuimus matri subveniendum esse existimavimus,

person's *potestas* she should enter upon the inheritance by his command. 3. Still, the descendants of the deceased, being *sui heredes* or occupying the position of *sui heredes*¹, whether of the first or a more remote degree, are preferred to the mother: and further by certain constitutions² the son or daughter of a deceased daughter is preferred to the mother of the latter, i.e. to their own grandmother. The father, too, of either of them, though not the grandfather or great-grandfather, ranks before the mother, that is when the dispute as to the inheritance is between such persons alone³. The brother by the same father, either of a son or daughter, used to exclude the mother; and a sister by the same father used to be admitted concurrently with the mother: but supposing there existed both a brother and a sister by the same father, and a mother as well who was admissible by the number of her children, the brother used to exclude the mother, and then the inheritance was equally divided between the brother and sister. 4. But in a constitution⁴, placed by us in the Code which bears our name, we have thought it right to render assistance to the mother,

¹ III. I. 15.

² C. 6. 57. 1 &c.

³ Ulpian xxvi. 8. If the mother, father, and father's father claimed together (which could only be if the deceased had been manumitted by

his grandfather) the grandfather took the inheritance; for the father excluded the mother, and the grandfather again became heir through the father. D. 38. 17. 5. 2.

⁴ C. 8. 59, 2.

respicientes ad naturam et puerperium et periculum et saepe mortem ex hoc casu matribus illatam. ideoque impium esse credidimus casum fortuitum in eius admitti detrimentum: si enim ingenua ter, vel libertina quater non peperit, immerito defraudabatur successione suorum liberorum: quid enim peccavit, si non plures, sed paucos peperit? Et dedimus ius legitimum plenum matribus, sive ingenuis sive libertinis, etsi non ter enixae fuerint vel quater, sed eum tantum vel eam qui quaeve morte intercepti sunt, ut et sic vocentur in liberorum suorum legitimam successionem. (5.) Sed cum antea constitutiones¹, iura legitima perscrutantes, partim matrem adiuva-
bant, partim eam praegravabant, et non in solidum eam voca-
bant, sed in quibusdam casibus, tertiam partem ei abstrahentes, certis legitimis dabant personis, in aliis autem contrarium faciebant; nobis visum est recta et simplici via matrem

having regard to her natural claims and to her maternal pangs, with the danger and often the death thereby befalling her: so that we have judged it impious to allow a fortuitous circumstance to prove detrimental to her. If, therefore, a freeborn woman have not borne three children, or a freedwoman not borne four, she would be deprived unreasonably of the succession to her children: for what wrong has she done by not bearing many children, but a few only? Hence we have given the full statutory right to mothers, whether freeborn or free-made, although they have not brought into being three or four children, but only the one son or daughter cut off by death; so that even under such circumstances they are to be admitted to a statutory succession to their children. 5. And whereas previous constitutions dealing with statutory rights¹ have in some instances aided the mother and in others dealt hardly with her and not admitted her to the entire inheritance; but have in certain cases deducted from her the third part and given it to some of the *legitimi heredes*, and in other cases have done the opposite; we have thought fit simply and plainly to prefer the mother to all

¹ The reference is to the constitutions of Constantine and Valentinian and Valens, quoted in Cod. Theod. 5. 1. 1 and 2, whereby a paternal uncle, or his son or grandson, and an emancipated brother, could claim one-

third of the inheritance as against a mother; thus robbing the latter, if *liberis honorata*, of this third; and on the other hand, yielding to her two-thirds, if not *liberis honorata*.

omnibus legitimis personis anteponi¹, et sine ulla deminutione filiorum suorum successionem accipere, excepta fratris et sororis persona², sive consanguinei sint sive sola cognationis iura habentes, ut quemadmodum eam toto alio ordini legitimo praeposuimus, ita omnes fratres et sorores, sive legitimi sint sive non, ad capiendas hereditates simul vocemus, ita tamen, ut si quidem solae sorores agnae vel cognatae, et mater defuncti vel defunctae supersint, dimidiam quidem mater, alteram vero dimidiam partem omnes sorores habeant, si vero matre superstita et fratre vel fratribus solis, vel etiam cum sororibus, sive legitima sive sola cognationis iura habentibus³, intestatus quis vel intestata moriatur, in capita distribuatur eius hereditas.

6. Sed quemadmodum nos matribus prospeximus, ita eas oportet suae soboli consulere: scituris eis, quod si tutores liberis non petierint, vel in locum remoti vel excusati intra

*legitimi*¹, and allow her to take the succession of her children without any deduction; a brother and sister alone being excepted², whether having the same father (as the deceased) or merely possessing the rights of cognation: so that as we prefer her to all other classes of *legitimi*, in like manner do we admit all brothers and sisters, whether *legitimi* or not, to take the inheritance concurrently with her; with this qualification, that if there be sisters only, agnates or cognates, and a mother of the deceased, the mother shall take one half, and the sisters amongst them the other half. But if a man or woman die intestate, and there be a mother surviving, and only a brother or brothers, or the latter together with sisters who have statutory claims or the claims of cognation only³, then the inheritance of the deceased shall be divided *per capita*.

6. But as we have guarded the interests of mothers, they in like manner ought to consult the welfare of their offspring: so let them take notice that if for the space of a year they fail to demand tutors for their children or neglect to seek a substitute for a tutor removed or excused, they shall deservedly be

¹ C. 6. 56. 7.

² I.e. not postponed to her.

³ Which claims the Praetor recognized: see III. 5. pr.

annum petere neglexerint, ab eorum impuberum morientium successione merito repellentur¹.

7. Licet autem vulgo quaesitus sit filius filiave, potest ad bona eius mater ex Tertulliano *senatusconsulto* admitti.

TIT. IV. DE SENATUSCONSULTO ORPHITIANO.

Per contrarium autem, ut liberi ad bona matrum intestatarum admittantur, *senatusconsulto Orphitiano* Orphito et Rufo Consulibus effectum est, quod latum est divi Marci temporibus². et data est tam filio quam filiae legitima hereditas, etiamsi alieno iuri subiecti sunt; et praeferuntur et consanguineis et agnatis defunctae matris³. (1.) Sed cum ex hoc *senatusconsulto* nepotes ad aviae successionem legitimo iure non vocabantur, postea hoc constitutionibus principalibus emendatum

debarred from the succession of the children in case of their dying under the age of puberty¹.

7. A mother may be admitted to the goods of a son or daughter by virtue of the *senatusconsultum Tertullianum*, even though the child be born in bastardy.

TIT. IV. ON THE SENATUSCONSULTUM ORPHITIANUM.

In the converse case it was enacted that children should succeed to the goods of their mothers, if intestate, by the *senatusconsultum Orphitianum*, passed in the consulship of Orphitus and Rufus, during the reign of the late emperor Marcus²: and this statutory inheritance was granted either to a son or a daughter, even if subject to another person's *potestas*, they being preferred to the *consanguinei* and *agnati* of the deceased mother³. 1. But as grandchildren were not called in to the succession of a grandmother by statutory right under this *senatusconsultum*, this point was afterwards amended by constitutions of the

¹ C. 6. 58. 10. As to excuse and removal of tutors, see I. 25 and 26.

² Marcus Aurelius is meant. The S.C. was enacted after Commodus had been associated with him in his

imperial authority. Ulpian xxvi. 7.

³ Hence the daughter ranks higher in the succession to the mother, than the mother in the succession to the daughter. III. 3. 3.

est¹, ut ad similitudinem filiorum filiarumque et nepotes et neptes vocentur. (2.) Sciendum est autem huiusmodi successiones quae a Tertulliano et Orphitiano deferuntur capitis deminutione² non perimi, propter illam regulam qua novae hereditates legitimae capitis deminutione non pereunt, sed illae solae quae ex lege duodecim tabularum deferuntur. (3.) Novissime sciendum est etiam illos liberos qui vulgo quaesiti sunt ad matris hereditatem ex hoc senatusconsulto admitti³.

4. Si ex pluribus legitimis heredibus quidam omiserint hereditatem, vel morte vel alia causa impediti fuerint, quo minus adeant: reliquis qui adierint accrescit illorum portio, et licet ante decesserint qui adierint, ad heredes tamen eorum pertinet⁴.

emperors¹ in such wise that grandsons and granddaughters are now admitted in like manner as sons and daughters. 2. It is further to be observed that such successions as are granted under the *senatusconsulta Tertullianum* and *Orphitianum* are not lost by *capitis deminutio*², by reason of the rule that statutory inheritances newly-created are not destroyed by *capitis deminutio*, but those only which are conferred by the law of the Twelve Tables. 3. We must also note lastly, that even children born in bastardy are admitted to their mother's inheritance under this *senatusconsultum*³.

4. If out of several statutory heirs some fail to take the inheritance, being prevented by death or other cause from entering, their portion accrues to the rest who make entry: and if those who have entered die before (the accrual falls in) still the accrual belongs to their heirs⁴.

¹ We find in the code a constitution of Valentinian, Theodosius and Arcadius to this effect. C. 6. 55. 9.

² Sc. *minima*, or as it is worded in D. 38. 17. 1. 8 (from which this passage is quoted), *capitis minutio salvo statu contingens*.

³ Paulus, S. R. IV. 10. 1.

⁴ This rule is a general one, not

merely applicable to inheritors by virtue of the S.C. Orphitianum. As to the concluding words and our filling up of the hiatus, see D. 38. 16. 9. The accrual is accessory to the original share; if therefore the latter had vested, the accession followed it.

TIT. V. DE SUCCESSIONE COGNATORUM.

Post suos heredes eosque quos inter suos heredes Praetor et constitutiones vocant et post legitimos (quo numero sunt agnati et hi quos in locum agnatorum tam supradicta senatusconsulta quam nostra erexit constitutio) proximos cognatos Praetor vocat. (1.) Qua parte naturalis cognatio spectatur. Nam agnati capite deminuti, quique ex his progeniti sunt, ex lege duodecim tabularum inter legitimos non habentur, sed a Praetore tertio ordine vocantur¹, exceptis solis tantummodo fratre et sorore emancipatis, non etiam liberis eorum, quos lex Anastasiana cum fratribus integri iuris constitutis vocat quidem ad legitimam fratris hereditatem sive sororis, non aequis tamen partibus, sed cum aliqua deminutione quam facile est ex ipsius constitutionis verbis colligere², aliis vero agnatis inferioris gradus, licet capitis deminutionem passi non

TIT. V. ON THE SUCCESSION OF COGNATES.

After the *sui heredes* and those whom the Praetor and the Constitutions call in with the *sui heredes*; and after the statutory heirs, in which class are the agnates and those whom the *senatusconsulta* above quoted and our constitution have elevated to the position of agnates, the Praetor calls the nearest cognates. 1. In this class natural relationship is the quality regarded: for agnates who have suffered *capitis deminutio* and their descendants are not classed by the law of the Twelve Tables amongst the statutory heirs, but are called in by the Praetor in the third class¹. Emancipated brothers and sisters, but not their descendants, are alone excepted; and these the Lex Anastasiana calls to the statutory inheritance of a brother or sister simultaneously with those brothers whose rights are unimpaired, yet not to equal participation with them, but subject to a certain deduction which it is easy to learn from the actual wording of the constitution²: at the same time it prefers them to other agnates of lower degree, even though the latter have undergone

¹ Gaius III. 27.

² This constitution is not extant, but is referred to in another of the same emperor, C. 5. 30. 4; and in one published by Justinian himself, C. 6. 58. 15. In the latter enactment, of later date than the Insti-

tutes, Justinian admitted emancipated brothers and sisters to a full share without deduction, and conferred the same privilege on their children, and also on uterine brothers and sisters and their children.

sunt, tamen eos anteponit, et proculdubio cognatis. (2.) Hos etiam qui per feminini sexus personas ex transverso cognatione iunguntur tertio gradu, proximitatis nomine, Praetor ad successionem vocat¹. (3.) Liberi quoque qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur². (4.) Vulgo quaesitos nullum habere agnatum manifestum est, cum agnatio a patre, cognatio sit a matre; hi autem nullum patrem habere intelleguntur³. eadem ratione nec inter se quidem possunt videri consanguinei esse, quia consanguinitatis ius species est agnationis: tantum igitur cognati sunt sibi, sicut et matris cognatis. Itaque omnibus istis ea parte competit bonorum possessio qua proximitatis nomine cognati vocantur⁴. (5.) Hoc loco et illud necessario admonendi sumus: agnationis quidem iure admitti aliquem ad hereditatem, etsi decimo gradu sit⁵, sive de lege duodecim tabularum quaeramus, sive de edicto quo Praetor legitimis

no *capitis deminutio*; and of course prefers them to cognates. 2. Those, again, who are related collaterally through persons of the female sex the Praetor calls to the succession in the third class, on the score of proximity¹. 3. So also descendants who are in an adoptive family are called to the inheritance of their actual ascendants in the same class². 4. It is clear that persons born in bastardy have no agnates, since agnation is through the father, though cognation may be through the mother: and such persons are considered to have no father³. On the same principle they cannot be considered *consanguinei* one to the other, because the right of consanguinity is a variety of agnation: hence they are only cognates one to the other, as being related through their mother. Therefore the possession of the goods comes to all such persons under that section whereby cognates are called in on the score of proximity⁴. 5. At this point it is proper for us to observe that a man is admitted to inherit on the title of agnation even if he be of the tenth degree⁵, whether we refer to the rule of the Twelve Tables or to that of the Edict in which the Praetor

¹ Gaius III. 30.

² This must refer to emancipated children who subsequently become arrogated: those given in adoption remained under *potestas*, and so were

sui heredes, according to Justinian's own constitution. See I. II. 2. and C. 8. 48. 10.

³ I. 10. 12.

⁴ III. 9. 3.

⁵ This is only an example, and

heredibus daturum se bonorum possessionem pollicetur. proximitatis vero nomine his solis Praetor promittit bonorum possessionem, qui usque ad sextum gradum cognationis sunt, et ex septimo a sobrino sobrinaque nato nataeue.

TIT. VI. DE GRADIBUS COGNATIONIS.

Hoc loco necessarium est exponere, quemadmodum gradus cognationis numerentur. Qua in re imprimis admonendum sumus cognationem aliam supra numerari, aliam infra, aliam ex transverso, quae etiam a latere dicitur. superior cognatio est parentum; inferior liberorum; ex transverso fratrum sororumve eorumque qui ex his progenerantur, et convenienter patrui, amitae, avunculi, materterae. et superior quidem et inferior cognatio a primo gradu incipit; at ea quae ex transverso numeratur a secundo. (1.) Primo gradu est supra pater, mater; infra filius, filia. (2.) Secundo supra avus, avia; infra nepos, neptis; ex transverso frater, soror. (3.) Tertio supra

promises to give to statutory heirs the possession of the goods. But the Praetor grants the possession on the score of proximity to those persons only who are related within the sixth degree, and in the seventh degree to the son or daughter of a second cousin.

TIT. VI. ON THE DEGREES OF COGNATION.

It is now necessary to explain how the degrees of cognation are reckoned: so we must first take note that one kind of cognation is counted upward, another downward, another transversely, or, as it is also called, collaterally. The upward cognation is that of ascendants, the downward that of descendants, the transverse that of brothers or sisters and their descendants, and so also of uncle or aunt paternal and uncle or aunt maternal. Upward and downward cognation commence with the first degree, transverse with the second. 1. In the first degree are father and mother upward; son and daughter downward. 2. In the second, grandfather and grandmother upward; grandson and granddaughter downward; brother and sister trans-

does not mean that the tenth degree was the limit, for we are told in III. 2. 3: "inter masculos agnationis

jure hereditas etiam longissimogradu ultro citroque capitur." See also D. 38. 16. 2. 1.

proavus, proavia: infra pronepos, proneptis; ex transverso fratris sororisque filius, filia, et convenienter patruus, amita, avunculus, matertera. patruus est patris frater qui Graece *πάτρις* vocatur; avunculus est matris frater qui apud Graecos proprie *μήτρις* appellatur: et promiscue *θείος* dicitur. amita est patris soror; matertera vero matris soror: utraque *θεία*, vel apud quosdam *τηθίς* appellatur. (4.) Quarto gradu supra abavus, abavia; infra abnepos, abneptis; ex transverso fratris sororisque nepos, neptis, et convenienter patruus magnus, amita magna, id est avi frater et soror, item avunculus magnus, matertera magna, id est aviae frater et soror; consobrinus, consobrina, id est qui quaeve ex fratribus aut sororibus progenerantur. sed quidam recte consobrinos eos proprie putant dici qui ex duabus sororibus progenerantur, quasi consororinos; eos vero qui ex duobus fratribus progenerantur proprie fratres patruales vocari (si autem ex duobus fratribus filiae nascentur, sorores patruales appellantur); at eos qui ex fratre et sorore propagantur amitinos proprie dici. (amitae tuae filii

versely. 3. In the third, great-grandfather and great-grandmother upward; great-grandson and great-granddaughter downward; and transversely the son or daughter of a brother or sister, as also a *patruus*, *amita*, *avunculus* or *matertera*. *Patruus* is the brother of a father, called in the Greek *πάτρις*: *avunculus* is the brother of a mother, called in the Greek *μήτρις*, *θείος* being the designation of either uncle. *Amita* is the sister of a father, *matertera* the sister of a mother, both being called *θεία*, or by some of the Greeks *τηθίς*. 4. In the fourth degree are a grandparent's grandfather and a grandparent's grandmother upward; a grandchild's grandson and a grandchild's granddaughter downward; and transversely the grandson and granddaughter of a brother or sister, also a great-uncle paternal and a great-aunt paternal, i.e. the brother and sister of a grandfather, and a great-uncle maternal and great-aunt maternal, i.e. the brother and sister of a grandmother; and a first cousin male or female, i.e. the children of brothers and sisters. Although some people think that, strictly speaking, those only are *consobrini* who are sprung from two sisters, as if *consororini*; whilst the sons of two brothers are technically styled *fratres patruales*, and their daughters *sorores patruales*; and the children of a brother and sister are properly *amitini*. The children of your aunt on the

consobrinum te appellant, tu illos amitinos.) (5.) Quinto supra atavus, atavia; infra adnepos, adneptis; ex transverso fratris sororisque pronepos, proneptis, et convenienter pro-patruus, proamita, id est proavi frater et soror; proavunculus, promatertera, id est proaviae frater et soror; item fratris patruelis, sororis patruelis, consobrini consobrinae, amitini amitinae filius filia; propior sobrinus sobrina (hi sunt patrum magni, amitae magnae, avunculi magni, materterae magnae filius filia). (6.) Sexto gradu sunt supra tritavus, tritavia; infra trinepos, trineptis; ex transverso fratris sororisque abnepos, abneptis; et convenienter abpatruus, abamita, id est abavi frater et soror, abavunculus, abmatertera, id est abaviae frater et soror; item sobrini sobrinaeque, id est qui quaeve ex fratribus vel sororibus patruelibus vel consobrinis vel amitinis progenerantur¹. (7.) Hactenus ostendisse sufficiet, quemad-

father's side call you *consobrinus*, you call them *amitini*. 5. In the fifth degree are a great-grandparent's grandfather and grandmother upward; the great-grandson and great-granddaughter of a grandchild downward; and transversely the great-grandson and great-granddaughter of a brother or sister; also a great-great-uncle paternal and great-great-aunt paternal, i.e. the brother and sister of a great-grandfather, and a great-great-uncle maternal and a great-great-aunt maternal, i.e. the brother and sister of a great-grandmother; also the son and daughter of a *frater patruelis*, *soror patruelis*, *consobrinus*, *consobrina*, *amitinus* or *amitina*; also a *propior sobrinus* and a *propior sobrina*, who are the son and daughter of a great-uncle or great-aunt paternal, or of a great-uncle or great-aunt maternal. 6. In the sixth degree are the great-grandfather and great-grandmother of a great-grandparent upward; the great-grandson and great-granddaughter of a great-grandchild downward; and transversely the great-great-grandson or great-great-granddaughter of a brother or sister; also an *abpatrus* and *abamita*, i.e. the brother and sister of a grandparent's grandfather and an *abavunculus* and *abmatertera*, i.e. the brother and sister of a grandparent's grandmother. Also *sobrini* and *sobrinae*, i.e. the sons and daughters of *fratres* or *sorores patruelis*, *consobrini* or *amitini*¹. 7. It will suffice to

¹ The list of the sixth degree is defective, as may be seen from the table annexed.

We are not to understand that the

son of your *consobrinus* is in the sixth degree to you; he is plainly in the fifth; but that the sons of two *consobrini* are one to the other in the sixth.

modum gradus cognationis numerentur. namque ex his palam est intellegere, quemadmodum ulterius quoque gradus numerare debemus: quippe semper generata quaeque persona gradum adiiciat, ut longe facilius sit respondere quoto quisque gradu sit, quam propria cognationis appellatione quemquam denotare. (8.) Agnationis quoque gradus eodem modo numerantur. (9.) Sed cum magis veritas oculata fide quam per aures animis hominum infigitur, ideo necessarium duximus, post narrationem graduum, etiam eos praesenti libro inscribi, quatenus possint et auribus et ex inspectione adolescentes perfectissimam graduum doctrinam adipisci.

10. Illud certum est ad serviles cognationes illam partem edicti qua proximitatis nomine bonorum possessio promittitur non pertinere: nam nec ulla antiqua lege talis cognatio computabatur¹. Sed nostra constitutione quam pro iure patronatus fecimus² (quod ius usque ad nostra tempora satis obscurum atque nube plenum et undique confusum fuerat), et hoc humanitate suggerente concessimus, ut si quis in servili con-

have demonstrated thus far how the degrees of cognation are counted: for from the above examples it is easy to understand how we ought to calculate more remote degrees, as a generation always adds one degree: so that it is far more easy to state in what degree a person stands, than to designate him by his proper term of cognation. 8. The degrees of agnation are reckoned in the same manner. 9. But as truth is much better fixed in men's minds by ocular demonstration than by the hearing, we have judged it necessary after this recital of the degrees, to have them also drawn out in a table in our present work, in order that students may obtain a full knowledge of the degrees both by the hearing and by the sight.

10. It is indisputable that the portion of the edict in which possession of the goods is promised on the score of proximity has no reference to the relationship of slaves: for such relationship was not taken into account by any ancient law¹. But by our constitution on the right of patronage²,—a right up to our time very obscure, cloudy and altogether confused,—we have through the prompting of our humanity granted this further privilege, that if any one who has formed a servile

¹ Ulpian XII. 3.

² C. 6. 4. 4.

sortio constitutus liberum vel liberos habuerit, sive ex libera sive ex servilis condicionis muliere, vel contra serva mulier ex libero vel servo habuerit liberos cuiuscumque sexus, et ad libertatem his¹ pervenientibus, et hi qui ex servili ventre nati sunt libertatem meruerunt; vel dum mulieres liberae erant, ipsi² in servitutem eos habuerunt, et postea ad libertatem pervenerunt; ut hi omnes ad successionem vel patris vel matris veniant, patronatus iure in hac parte sopito: hos enim liberos non solum in suorum parentum successionem, sed etiam alterum in alterius mutuam successionem vocavimus, ex illa lege specialiter eos vocantes, sive soli inveniantur qui in servitute nati et postea manumissi sunt, sive una cum aliis qui post libertatem parentum concepti sunt, sive ex eadem matre vel ex eodem patre, sive ex aliis nuptiis, ad similitudinem eorum qui ex iustis nuptiis procreati sunt.

alliance shall have a child or children, whether by a free woman or by a woman of servile rank, or on the other hand if a slave woman shall have children of either sex by a free-man or a slave, and such persons¹ attain to freedom, and those born from the slave mother also gain their liberty: or supposing the mothers were free, and the fathers² in servitude, and the latter afterwards become free: then all such children obtain the succession of their father or mother, the right of patronage being in such case in abeyance. For we have called such children not only to the succession of their parents, but also reciprocally one to the succession of the other: summoning them specially under this law, whether those born in servitude and afterwards manumitted be found alone, or whether they coexist with others conceived after their parents obtained their liberty; and also whether they spring from the same father and the same mother, or from a different union; just as the rule is with those who are the children of a lawful marriage.

¹ I. e. the parents.

² *Ipsi* obviously = the masters, *eos* = the fathers. It is true there has been no previous mention of the masters, but the constitutions are often worded in this loose manner.

The meaning of Justinian's confused statement is that children succeed to the inheritance of their parents

in the cases following: 1st, if the father and mother were both slaves when the child was born, and therefore the child also a slave at birth, but all parties have been subsequently manumitted: 2nd, if the father was a slave and the mother a free woman, the children (who can of course take their mother's inheritance by the

11. Repetitis itaque omnibus quae iam tradidimus, apparet non semper eos qui parem gradum cognationis obtineant pariter vocari, eoque amplius, nec eum quidem qui proximior sit cognatus semper potiores esse. cum enim prima causa sit suorum heredum quosque inter suos heredes iam enumeravimus¹, apparet prosepotem vel abnepotem defuncti potiores esse quam fratrem aut patrem matremque defuncti, cum aliis quin pater quidem et mater, ut supra quoque tradidimus, primum gradum cognationis obtineant, frater vero secundum, pronepos autem tertio gradu sit cognatus, et abnepos quarto; nec interest, in potestate morientis fuerit, an non, quod vel emancipatus vel ex emancipato aut ex feminino sexu propagatus est. (12.) amotis quoque suis heredibus quosque inter suos heredes vocari diximus, agnatus qui integrum ius agnationis habet, etiamsi longissimo gradu sit, plerumque potior habetur quam proximior cognatus: nam patruus nepos

11. Therefore to recapitulate all that we have already laid down, it appears that those who stand in an equal degree of cognation are not always called to the succession together: and further, that the cognate of nearer degree is not always preferred. For as the first right belongs to the *sui heredes* and those whom we have above reckoned with the *sui heredes*¹, it is plain that a great-grandson or great-great-grandson of the deceased is preferred to his brother, father or mother: although (as we have stated above) a father and mother stand in the first degree of cognation, a brother in the second, whilst a great-grandson is in the third and a great-great-grandson in the fourth. Neither does it matter whether the descendant was under the *potestas* of the deceased or not under it, by reason of being himself emancipated, or being the child of a person emancipated, or being descended through the female line. 12. Again, leaving out of consideration *sui heredes* and those whom we have appointed to be called amongst the *sui heredes*, an agnate who has the full rights of agnation, even though of the most remote degree, is in general preferred to a more closely related cognate: for

statute law) take their father's also if he be emancipated: 3rd, if the mother was a slave and therefore the child a slave, and both have been

manumitted, the child becomes heir to his mother, and to his father as well.

¹ III. 1. 2.

vel pronepos avunculo vel materterae praefertur. totiens igitur dicimus, aut potioem haberi eum qui proximioem gradum cognationis obtinet, aut pariter vocari eos qui cognati sunt, quotiens neque suorum heredum iure quique inter suos heredes sunt, neque agnationis iure aliquis praeferrri debeat, secundum ea quae tradidimus, exceptis fratre et sorore emancipatis qui ad successionem fratrum vel sororum vocantur, qui etsi capite deminuti sunt, tamen praeferruntur ceteris ulterioris gradus agnatis.

TIT. VII. DE SUCCESSIONE LIBERTORUM.

Nunc de libertorum bonis videamus. Olim itaque licebat liberto patronum suum impune testamento praeterire: nam ita demum lex duodecim tabularum¹ ad hereditatem liberti vocabat patronum, si intestatus mortuus esset libertus nullo suo herede relicto. itaque intestato quoque mortuo liberto, si is suum heredem reliquisset, nihil in bonis eius patrono ius erat.

the grandson or great-grandson of a paternal uncle is preferred to a maternal uncle or aunt. Therefore the case wherein we lay down that the person standing in the nearer degree of cognation is preferred, or that those who are cognates are called in together, is when no one ought to have a preference by right of being amongst the *sui heredes* or those counted as *sui heredes*, or by right of agnation, according to those principles which we have stated. But there is an exception in the case of an emancipated brother and sister, who are called to the succession of their brothers and sisters: for even if they have undergone *capitis deminutio* they are still preferred to agnates of a more remote degree.

TIT. VII. ON THE SUCCESSION OF FREEDMEN.

Let us now consider about the goods of freedmen. Formerly, then, a freedman might with impunity pass over his patron in his testament: for a law of the Twelve Tables¹ called the patron to the inheritance of a freedman only if the freedman had died intestate and leaving no *suus heres*: therefore even when a freedman died intestate, if he left a *suus heres*, his patron had no claim to his goods. And if indeed the *suus*

¹ Tab. v. l. 8.

et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur querela; si vero adoptivus filius esset, aperte iniquum erat nihil iuris patrono superesse. (1.) Qua de causa postea Praetoris edicto haec iuris iniquitas emendata est. sive enim faciebat testamentum libertus, iuebatur ita testari, ut patrono partem dimidiam bonorum suorum relinqueret; et si aut nihil aut minus partis dimidia relinquerat, dabatur patrono contra tabulas testamenti partis dimidia bonorum possessio. si vero intestatus moriebatur, suo herede relicto filio adoptivo, dabatur aequè patrono contra hunc suum heredem partis dimidia bonorum possessio. prodesse autem liberto solebant ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habebat, sed etiam emancipati et in adoptionem dati, si modo ex aliqua parte heredes scripti erant, aut praeteriti contra tabulas bonorum possessionem ex edicto petierant: nam exheredati nullo modo repellebant patronum. (2.) Postea lege Papia¹ adaucta

heres he left were one of his own actual children, there seemed no ground for complaint; but if the son had been adopted, it was clearly inequitable that no right should survive to the patron. 1. Wherefore this defect from equity in the rule was afterwards corrected by the Praetor's edict. For if a freedman made a testament, he was ordered to make it in such a manner as to leave his patron the half of his goods: and if he left him either nothing or less than the half, possession of one half of the goods was given to the patron in contravention of the provisions of the testament: and if he died intestate, leaving an adopted son as *suus heres*, possession of half the goods was still given to the patron as against such *suus heres*. But all actual descendants used to avail the freedman to exclude the patron, not only those whom he had under his *potestas* at the time of his death, but also those emancipated or given in adoption, provided only they were appointed heirs to some portion, or, being passed over, sued under the edict for possession of the goods in contravention of the provisions of the testament; for when disinherited they in no way barred the patron. 2. Afterwards by the Lex Papia¹ the rights of patrons

¹ The Lex Papia Poppaea, A.D. 4. For a full account of the numerous

clauses in this law see App. (G) to our edition of Gains.

sunt iura patronorum qui locupletiores libertos habebant. Cautum est enim, ut ex bonis eius qui sestertiorum centum millium patrimonium reliquerat, et pauciores quam tres liberos habebat, sive is testamento facto sive intestato mortuus erat, virilis pars patrono debebatur. itaque cum unum filium filiamve heredem reliquerat libertus, perinde pars dimidia patrono debebatur, acsi is sine ullo filio filiave decessisset; cum duos duasve heredes reliquerat, tertia pars debebatur patrono; si tres reliquerat, repellebatur patronus¹.

3. Sed nostra constitutio², quam pro omnium notione Graeca lingua compendioso tractatu habito composuimus, ita huiusmodi causas definivit, ut si quidem libertus vel liberta minores centenariis sint, id est minus centum aureis habeant substantiam (sic enim legis Papiae summam interpretati sumus, ut pro mille sestertiis unus aureus computetur), nullum locum habeat

who had wealthy freedmen were enlarged. For it was provided that a proportionate share should be due to the patron out of the goods of a freedman who left a patrimony of the value of 100,000 sesterces and had fewer than three children, whether he died testate or intestate. When, therefore, the freedman left as heir one son or one daughter, a half was due to the patron, just as though he had died without any son or daughter: but when he left two heirs, male or female, a third part was due: and when he left three, the patron was excluded¹.

3. But one of our own constitutions², which for the information of all men we have published in the Greek language with a compendious explanation, has discriminated cases of this kind as follows; that if the freedman or freedwoman be less than *centenarii*, i.e. if they have property of smaller value than one hundred *aurei* (for we have estimated the sum named in the Lex Papia in such wise that one *aureus* is held equiva-

¹ The title so far has been little more than a transcript of Gaius III. 39-42; parts of it also bear a striking resemblance to Ulpian XXIX. 1. Gaius, in III. 43-76, gives a number of complicated rules as to the inheritances of freedwomen, as to the different rights of patrons, patronesses and their children, and as to the peculiarities of

the succession to Junian Latins. These rules are only important from an antiquarian point of view, but those who consider the subject of interest will find it discussed in App. (L) to our edition of Gaius and Ulpian.

² C. 6. 4. 4. But this constitution exists only in a fragmentary shape.

patronus in eorum successionem, si tamen testamentum fecerint. sin autem intestati decesserint nullo liberorum relicto, tunc patronatus ius quod erat ex lege duodecim tabularum integrum reservavit. Cum vero maiores centenariis sint, si heredes vel bonorum possessores liberos habeant, sive unum sive plures, cuiuscumque sexus vel gradus, ad eos successionem parentum deduximus, omnibus patronis una cum sua progenie semotis. sin autem sine liberis decesserint, si quidem intestati, ad omnem hereditatem patronos patronasque vocavimus; si vero testamentum quidem fecerint, patronos autem vel patronas praeterierint, cum nullos liberos haberent, vel habentes eos exheredaverint, vel mater sive avus maternus eos praeterierit, ita ut non possint argui¹ inofficiosa eorum testa-

ment to a thousand sesterces), the patron shall have no place in their succession, provided only they have made a testament: but if they have died intestate, leaving no children, then the right of patronage, originating from the law of the Twelve Tables, is maintained intact. When they are better than *centenarii*, if they have descendants, whether one or more, of any sex or degree, as their heirs or *bonorum possessores*, we have conferred on these descendants the succession to their ascendants, rejecting the patrons and their offspring: but if the freedmen have died without descendants and intestate, we have called the patrons or patronesses to their entire inheritance. If, however, they have made a testament and passed over their patrons or patronesses, either having no descendants, or having some and disinheriting them; or if a mother or maternal grandfather has passed over descendants, so that their testaments cannot be impugned as "inofficious¹," then according to our

¹ This does not mean that the *actio de inofficioso* was inapplicable to a case of praeterition by a mother or maternal grandfather. This had indeed been the case originally, because the duty of appointing by testament was connected with the possession of *patria potestas*; but the more liberal legislation of Justinian had altered this and made it a duty in all cases to provide for descendants by blood. The

words *ita ut non possint argui inofficiosa eorum testamenta* are not, therefore, to be considered as applicable to the testaments of maternal ancestors alone, but to the testaments of any ancestors; and the reference is to the rule laid down in C. 3. 28. 30, that when any legacy or share of the inheritance, however small, had been bestowed, proceedings should be taken by *actio in supplementum*

menta : tunc ex nostra constitutione per bonorum possessionem contra tabulas non dimidiam, ut ante, sed tertiam partem bonorum liberti consequantur, vel quod deest eis ex constitutione nostra repleatur, si quando minus tertia parte bonorum suorum libertus vel liberta eis reliquerint, ita sine opere, ut nec liberis liberti libertaeve ex ea parte legata vel fideicommissa praestentur, sed ad coheredes hoc onus redundaret; multis aliis casibus a nobis in praefata constitutione congregatis, quos necessarios esse ad huiusmodi iuris dispositionem perspeximus : ut tam patroni patronaeque, quam liberi eorum, nec non qui ex transverso latere veniunt, usque ad quintum gradum, ad successionem libertorum vocentur, sicut ex ea constitutione intellegendum est; ut, si eiusdem patroni vel patronae vel duorum duarum pluriumve sint liberi, qui proximior est ad liberti seu libertae vocetur successionem, et in capita, non in stirpes, dividatur successio, eodem modo et in his qui

constitution the patrons or patronesses obtain by possession of the goods in contravention of the provisions of the testament not the half (as used to be the case), but a third part of the goods of the freedman; or by virtue of the constitution any deficiency is made up to them, if the freedman or freedwoman has left them less than a third of the property; so cleared of encumbrance, that legacies or trusts are not paid out of such portion even to descendants of the freedman or freedwoman, but the burden falls upon their co-heirs. And in the constitution aforementioned many other cases have been collected by us, which we have judged essential for the settlement of this branch of law; so that not only patrons and patronesses, but their descendants also, as well as their collateral relations to the fifth degree, are called to the succession of freedmen, as may be understood from the constitution itself; in such wise that if there be descendants of any one patron or patroness, or of two or more of them, the nearest is called to the succession of the freedman or freedwoman, and the inheritance is divided *per capita* and not *per stirpes*: the same plan being also adopted

legitimae, which left the testamentary dispositions valid so far as was possible, and not by *querela inoffi-*

ciosi, which set the testament aside altogether.

ex transverso latere veniunt servando. paene¹ enim consonantia iura ingenuitatis et libertinitatis in successioneibus fecimus.

4. Sed haec de his libertinis hodie dicenda sunt qui in civitatem Romanam pervenerunt, cum nec sunt alii liberti, simul et dediticii et Latinis sublati², cum Latinorum legitimae successiones nullae penitus erant, qui licet ut liberi vitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amittebant, et quasi servorum ita bona eorum iure quodammodo peculii ex lege Iunia³ manumissores detinebant. postea vero senatusconsulto Largiano cautum fuerat, ut liberi manumissoris non nominatim exheredati facti extraneis heredibus eorum⁴ in bonis Latinorum praeponerentur. quibus

in the case of collaterals. For we have made the rights of the freeborn and freemade almost¹ identical in reference to successions.

4. These then are the rules to be applied at the present day to freedmen who have attained to Roman citizenship; for there are no others, dediticii and Latini having been abolished together²: in fact there never were any statutory successions to Latins, for although such persons lived as free men, yet with their last breath they lost both life and liberty, and their manumitters by virtue of the Lex Junia³ retained their goods, like those of slaves, through a kind of right of *peculium*. Afterwards, however, it was provided by the *senatusconsultum Largianum* that the children of a manumitter, when not expressly disinherited, should be preferred to his extraneous heirs in the succession to the goods of Latins⁴. Next followed an

¹ The word *paene* is explained in III. 9. 5, where attention is called to the fact that the collaterals of a free-born person were eligible if within the sixth degree; but those of a freedman only if within the fifth.

² C. 7. 5 and C. 7. 6.

³ Lex Junia Norbana, A. D. 19. See Gaius I. 22, and App. (A) to our edition of that author, for an account of the Latini Juniani.

⁴ It is plain that *eorum* is written carelessly for *ejus*. The old rule

was that the patron of a Latin could bequeath the Latin's inheritance at pleasure, but that the patron of a *civis Romanus* had no testamentary power over the freedman's property. The *senatusconsultum Largianum* invented a mode of devolution for Latin property about half-way between the two. When the right of assigning a freedman of the citizen class was established (see next title) the appointee could only be one of the descendants of the patron.

supervenit etiam divi Traiani edictum, quod eundem hominem, si invito vel ignorante patrono ad civitatem venire ex beneficio Principis festinavit, faciebat vivum quidem civem Romanum, Latinum autem morientem. sed nostra constitutione, propter huiusmodi condicionum vices¹ et alias difficultates, cum ipsis Latinis etiam legem Iuniam et senatusconsultum Largianum et edictum divi Traiani in perpetuum deleri censuimus, ut omnes liberti civitate Romana fruantur, et mirabili modo, quibusdam adiectionibus, ipsas vias quae in Latinitatem ducebant ad civitatem Romanam capiendam transposuimus².

TIT. VIII. DE ASSIGNATIONE LIBERTORUM.

In summa, quod ad bona libertorum, admonendi sumus

edict of the late Emperor Trajan, which laid down that a slave who had obtained citizenship by a hasty grant of the Emperor against the will or without the knowledge of his patron should be a Roman citizen during his lifetime and a Latin at his death. But because of these alterations of status¹ and other inconveniences, we have decided in our constitution that the Lex Junia, the *senatusconsultum Largianum* and the edict of the Emperor Trajan shall be abolished for ever together with Latins themselves, so that all freedmen are to enjoy Roman citizenship; and by further provisions of an admirable kind we have made the very methods available for procuring Roman citizenship which used to lead to Latinity².

TIT. VIII. ON THE ASSIGNMENT OF FREEDMEN.

In the last place we must take note with reference to the

¹ Sc. that a man should be a citizen for life and a Latin at death, or a Latin for life and a slave at death. See C. 7. 6. pr.

² There used to be three requirements in order that a manumitted slave might become a full Roman citizen: 1st, that the manumission should be by *vindicta*, *census* or *testamentum*; 2nd, that the slave

should be more than thirty years of age, and the master more than twenty, unless the cause of manumission were approved by the council; 3rd, that the slave should be his master's property *ex jure Quiritium*, and not merely *in bonis*. See Gaius I. 17. If any of these qualifications was wanting, the manumitted slave used to be a Latin only.

senatum censuisse¹, ut quamvis ad omnes patroni liberos qui eiusdem gradus sint aequaliter bona libertorum pertineant, tamen licere parenti uni ex liberis assignare libertum, ut post mortem eius solus is patronus habeatur cui assignatus est, et ceteri liberi qui ipsi quoque ad eadem bona nulla assignatione interveniente pariter admitterentur, nihil iuris in his bonis habeant. sed ita demum pristinum ius recipiunt, si is cui assignatus est decesserit nullis liberis relictis. (1.) Nec tantum libertum, sed etiam libertam, et non tantum filio nepotivae, sed etiam filiae neptivae assignare permittitur. (2.) Datur autem haec assignandi facultas ei qui duos pluresve liberos in potestate habeat, ut eis quos in potestate habet assignare ei libertum libertamve liceat². unde quaerebatur, si eum cui assignaverit postea emancipaverit, num evanescat assignatio³?

goods of freedmen, that the senate has ordained¹ that although such devolve in equal shares on all the descendants of the patron who are of the same degree, yet the ascendant may assign a freedman to any one of his descendants; so that after his death that person alone shall be reckoned the patron to whom the freedman has been assigned; and the other descendants, who would have been admitted equally to the said goods, if no assignment had been made, shall have no title to them; but only recover their original right in case the person to whom the freedman was assigned dies without leaving any descendants. 1. And not only may we assign a freedman, but a freedwoman also; and not only to a son or grandson, but to a daughter or granddaughter as well. 2. This power of assignment is granted, therefore, to a man having two or more descendants under his *potestas*, in such wise that he may assign the freedman or freedwoman to any of the persons so under his *potestas*². Hence a question has been raised whether the assignment becomes inoperative, supposing he subsequently emancipate the assignee³. And it has been decided that it

¹ The date of the S. C. is mentioned in § 3 of the title.

² He might assign the freedman to an emancipated descendant as well; D. 38. 4. 9.

³ If he emancipate the son after

assigning to him a freedman, the assignment becomes void; whereas according to the excerpt from Modestinus already quoted, D. 38. 4. 9, the assignment is good if made after the emancipation of the son.

sed placuit evanescere, quod et Iuliano et aliis plerisque visum est. (3.) Nec interest testamento quis assignet, an sine testamento; sed etiam quibuscumque verbis hoc patronis permittitur facere, ex ipso senatusconsulto quod Claudianis temporibus factum est Suillo Rufo et Ostorio Scapula Consulibus¹.

TIT. IX. DE BONORUM POSSESSIONIBUS.

Ius bonorum possessionis introductum est a Praetore emendandi veteris iuris gratia. Nec solum in intestatorum hereditatibus vetus ius eo modo Praetor emendavit, sicut supra dictum est², sed in eorum quoque qui testamento facto decesserint. nam si alienus postumus heres fuerit institutus, quamvis hereditatem iure civili adire non poterat, cum institutio non valebat³, honorario tamen iure bonorum possessor efficiebatur, videlicet cum a Praetore adiuvabatur: sed et hic a nostra

does become inoperative, in accordance with the opinion of Julian and most others. 3. It makes no difference whether a man assign by testament or without a testament, and patrons are also allowed to do this in any form of words whatsoever by virtue of a *senatusconsultum* made in the time of Claudius, in the consulship of Suillus Rufus and Ostorius Scapula¹.

TIT. IX. ON POSSESSIONS OF GOODS.

The right to possession of the goods was invented by the Praetor with the intent of amending the ancient law. And the Praetor improved the ancient law in this manner not only with reference to the inheritances of intestates, as we have already stated², but with reference also to those of persons who have died after making a testament: for if an after-born stranger were appointed heir, although he could not enter on the inheritance according to the civil law, by reason of his institution being invalid³, yet he was made *bonorum possessor* by the honorary law, that is to say, through being assisted by the Praetor: but such an one according to a constitution of our

¹ A. D. 45.

² III. I. 9.

³ Invalid because directed to an

uncertain person. See II. 20. 28, for the Praetorian law; Gaius II. 241, for the old civil rule.

constitutione¹ hodie recte heres instituitur, quasi et iure civili non incognitus. (1.) Aliquando tamen neque emendandi neque impugnandi veteris iuris, sed magis confirmandi gratia pollicetur bonorum possessionem. nam illis quoque qui recte facto testamento heredes instituti sunt dat secundum tabulas bonorum possessionem; item ab intestato suos heredes et agnatos ad bonorum possessionem vocat. sed et remota quoque bonorum possessione ad eos hereditas pertinet iure civili². (2.) Quos autem Praetor solus vocat ad hereditatem, heredes quidem ipso iure non fiunt. nam Praetor heredem facere non potest: per legem enim tantum vel similem iuris constitutionem heredes fiunt, veluti per senatusconsultum et constitutiones principales; sed cum eis Praetor dat bonorum possessionem, loco heredum constituuntur, et vocantur bonorum possessores³.

own¹ is now-a-days lawfully appointed heir, as being not unrecognized even by the civil law. 1. Sometimes, however, the Praetor promises possession of the goods with no intention either of amending or assailing the ancient law, but rather with the purpose of confirming it; for he also gives a possession of goods "in accordance with the provisions" to those who have been appointed heirs in a testament duly made. He further calls *sui heredes* and agnates to the possession of the goods on intestacy: although, even apart from the possession of goods, the inheritance belongs to them by the civil law². 2. But those whom the Praetor alone calls to the inheritance do not in strictness of law become heirs, since the Praetor cannot create an heir: for heirs exist only in consequence of a *lex* or some analogous constitution of law, through *senatusconsulta* and constitutions of the Emperors for example; but when the Praetor grants them possession of the goods, they are put into the position of heirs, and are called *bonorum possessores*³. The Praetor has

¹ C. 6. 48, the text of which unfortunately is lost.

² The chief advantage of being *bonorum possessor* was the right to claim the benefit of the interdict "Quorum bonorum;" as to which see IV. 15. 3.

³ Gaius III. 32, 33. It would seem from the wording of this

passage that the Praetor originally granted *bonorum possessio* to those only who were *heredes* by the civil law, but had lost their legal rights by some oversight, such as exceeding the time appointed for *creditor*. It was a further extension on his part to admit those who had no civil claim at all.

adhuc autem et alios complures gradus Praetor fecit in bonorum possessionibus dandis, dum id agebat, ne quis sine successore moriatur: nam angustissimis finibus constitutum per legem duodecim tabularum ius percipiendarum hereditatum Praetor ex bono et aequo dilatavit¹.

(3.) Sunt autem bonorum possessiones ex testamento quidem hae². prima quae praeteritis liberis datur, vocaturque contra tabulas. secunda quam omnibus iure³ scriptis heredibus Praetor pollicetur, ideoque vocatur secundum tabulas. Et cum de testamentis prius locutus est, ad intestatos transitum facit. et primo loco suis heredibus et his qui ex edicto Praetoris suis connumerantur dat bonorum possessionem, quae vocatur unde liberi. secundo legitimis heredibus. tertio decem personis quas extraneo manumissori praeferibat (sunt autem decem personae hae: pater, mater, avus, avia, tam paterni quam materni; item filius, filia, nepos, neptis, tam ex filio quam ex filia; frater, soror, sive consan-

further made many other degrees in the giving of possession of the goods, whilst providing that no one shall die without a successor: for he has amplified in accordance with fairness and equity the right of taking inheritances, which under the law of the Twelve Tables had been confined within very narrow limits¹.

3. The testamentary possessions are the following²: first, that granted to omitted descendants, styled *contra tabulas*: second, that which the Praetor promises to all lawfully-appointed³ heirs, therefore styled *secundum tabulas*. And after first dealing with testaments, he passes on to intestates: and in the first place grants the possession of the goods called *unde liberi* to the *sui heredes* and those classed amongst the *sui heredes* according to his edict: secondly, to the statutory heirs: thirdly, to the ten persons whom he used to prefer to a manumitting stranger. And the ten persons are these: father and mother; grandfather and grandmother, both paternal and maternal; son and daughter; grandson and granddaughter, whether by a son or a daughter; brother and sister, whether by the father's side or the mother's. In the fourth place he grants

¹ Gaius III. 18—32.

² Ulpian xxviii. 1—8. For a full account of the various Bonorum Possessiones see App. K.

³ *Jure praetorio* as well as *jure civili*; or *jure praetorio* although not *jure civili*, as in the examples given by Ulpian in xxviii. 6.

guinei sive uterini). quarto cognatis proximis. quinto tum quem ex familia¹. sexto patrono et patronae, liberisque eorum et parentibus². septimo viro et uxori. octavo cognatis manumissoris. (4.) Sed eas quidem praetoria induxit iuridictio. Nobis tamen nihil incuriosum praetermissum est, sed nostris constitutionibus³ omnia corrigentes, contra tabulas quidem et secundum tabulas bonorum possessiones admisimus, utpote necessarias constitutas, nec non ab intestato unde liberi et unde legitimi bonorum possessiones. quae autem in Praetoris edicto quinto loco posita fuerat, id est unde decem personae, eam pio proposito⁴ et compendioso sermone supervacuum ostendimus: cum enim praefata bonorum possessio decem personas praeponere extraneo manumissori, nostra constitutio quam de emancipatione liberorum fecimus⁵ omnibus parentibus eisdemque manumissoribus contracta fidu-

possession to the nearest cognates; in the fifth "*tum quem ex familia*," in the sixth to the patron and patroness and their descendants and ascendants²; in the seventh to the husband and wife; in the eighth to the cognates of the manumitter. 4. These are the possessions which were introduced by the Praetor's authority. No portion of them, however, has been passed over by us without consideration, but revising every detail in our constitutions³, we have accepted the possessions of goods *contra tabulas* and *secundum tabulas*, as being introduced of necessity; and so also the possessions of goods on intestacy called *unde liberi* and *unde legitimi*. But with pious purpose⁴ and in a few words we have rendered superfluous that possession which stood fifth in the Praetor's edict, viz. the *unde decem personae*. For whereas the possession of goods just mentioned preferred the ten persons to a manumitting stranger, our constitution, which we have made on the subject of emancipation of descendants⁵, has caused all parents to effect the

¹ The paragraph of the edict probably ran "*tum quem ex familia patroni proximum oportebit, vocabo.*" But another reading of considerable authority is *tamquam ex familia*, and we reserve for App. K the reasons which induce us to adopt the wording in our text.

² That is, those who had suffered *capitis deminutio* and so were not

included in the class "*tum quem ex familia.*" See App. K.

³ C. 8. 49. 6, and C. 6. 4. 4.

⁴ That is to say, through regard for the tie of blood; so that the omission of special agreement with the emancipating stranger is not to bar the parent's successory rights.

⁵ C. 8. 49. 6.

cia manumissionem facere dedit, ut ipsa manumissio eorum hoc in se habeat privilegium¹ et supervacua fiat praedicta bonorum possessio. sublata igitur praefata quinta bonorum possessione, in gradum eius sextam antea bonorum possessionem induximus, et quintam fecimus quam Praetor proximis cognatis pollicetur. (5.) cumque antea septimo loco fuerat bonorum possessio tum quem ex familia, et octavo unde liberi patroni patronaeque et parentes eorum, utramque per constitutionem nostram quam de iure patronatus fecimus² penitus vacuavimus: cum enim ad similitudinem successionis ingenuorum libertinorum successiones posuimus, quas usque ad quintum tantummodo gradum coartavimus, ut sit aliqua inter ingenuos et libertos differentia, sufficit eis tam contra tabulas bonorum possessio, quam unde legitimi et unde cognati³,

manumission themselves, being the manumitters by reason of the fiduciary contract implied, so that the very fact of a manumission involves in itself this privilege¹, and the above-mentioned possession of the goods becomes superfluous. Abolishing, therefore, the afore-named fifth possession of the goods, we have raised what before was the sixth into its place, and made that to be the fifth which the Praetor promises to the nearest cognates. 5. And whereas there used to be in the seventh place the possession of the goods called *tum quem ex familia*, and in the eighth the *unde liberi patroni patronaeque et parentes eorum*, we have by the constitution which we made on the right of patronage² abolished entirely both of them. For since we have arranged the successions of freedmen after the pattern of the succession of the freeborn (though we have limited the former to the fifth degree only, that there may be some difference between the freeborn and the freed), the possessions *contra tabulas*, *unde legitimi* and *unde cognati*³ are sufficient to enable claimants to assert their

¹ Sc. of *bonorum possessio*. Even if the stranger emancipates, he does it as agent of the parent, and no agreement to the contrary can stand good.

² C. 6. 4. 4. 12.

³ The patrons were treated as relatives of the freedman: δοκοῦσι συγγενεῖς εἶναι τῶν ἐλευθερουμένων οἱ ἐλευθεροῦντες αὐτούς: C. 6. 4. 4,

restored conjecturally, see Spangenberg, p. 338: and probably there was some provision to the same effect in the XII. Tables; for in D. 50. 16. 195. 1 Ulpian, whilst discussing the various significations of the word *familia*, says: "the word also denotes persons, as for instance when the law is treating of patron and freedman, and words it *ex ea familia in ea familia*."

ex quibus possint sua iura vindicare, omni scrupulositate et inextricabili errore duarum istarum bonorum possessionum resoluta. (6.) aliam vero bonorum possessionem quae unde vir et uxor appellatur, et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus, et altiore loco, id est sexto, eam posuimus, decima veteri bonorum possessione quae erat unde cognati manumissoris propter causas enarratas merito sublata : ut sex tantummodo bonorum possessiones ordinariae permaneant, suo vigore pollentes¹. (7.) Septima eas secuta quam optima ratione Praetores introduxerunt. novissime enim promittitur edicto his etiam bonorum possessio, quibus ut detur, lege vel senatusconsulto vel constitutione comprehensum est, quam neque bonorum possessionibus quae ab intestato veniunt, neque iis quae ex testamento sunt, Praetor stabili iure connumeravit, sed quasi ultimum et extraordinarium auxilium, prout res exigit, accom-

rights, and the whole of the intricacy and inevitable bewilderment of the two possessions last named is taken away. 6. Another possession of the goods, called "*unde vir et uxor*," and placed ninth in order amongst the ancient possessions, we have maintained in all its force and raised to a higher rank, i.e. to the sixth: abolishing at the same time the tenth ancient possession, viz. the *unde cognati manumissoris*, for the reasons above stated, so that only six ordinary possessions now remain in force¹. 7. A seventh is supplementary to them, and was introduced for excellent reason by the Praetors: for in their edict possession of the goods is promised lastly to those "to whom it has been provided that it shall be given by any *lex, senatusconsultum* or constitution." This possession the Praetor has not classed on any fixed principle either with the possessions of the goods which arise on intestacy or with those dependent on a testament; but has provided it as a last and extraordinary remedy, (to be used) as circumstances demand, viz. on behalf of those who come in, whether by testament or on intestacy,

Hence it is that many jurists hold that the fifth title to possession "*tum quem ex familia*" would more accurately be styled "*tamquam ex familia*."

¹ This agrees with the excerpt

from Modestinus in D. 38. 15. 1, "*Intestati hi gradus vocantur: primum sui heredes, secundo legitimi, tertio proximi cognati, deinde vir et uxor.*"

modavit, scilicet his qui ex legibus, senatusconsultis, constitutionibus Principum ex novo iure¹, vel ex testamento vel ab intestato veniunt. (8) Cum igitur plures species successionum Praetor introduxisset easque per ordinem disposuisset, et in unaquaque specie successionis saepe plures extent dispari gradu personae: ne actiones creditorum differrentur, sed haberent quos convenirent, et ne facile in possessionem bonorum defuncti mitterentur, et eo modo sibi consulerent, ideo petendae bonorum possessioni certum tempus praefinivit. liberis itaque et parentibus tam naturalibus quam adoptivis in petenda bonorum possessione anni spatium, ceteris centum dierum dedit². (9) Et si intra hoc tempus aliquis bonorum possessionem non petierit, eiusdem gradus personis accrescit; vel si nemo sit, deinceps ceteris perinde bonorum possessionem ex successorio edicto pollicetur, acsi is qui praecedebat ex

under *leges* or *senatusconsulta*, or, according to modern jurisprudence, under imperial constitutions¹. 8. As the Praetor, then, had introduced many kinds of succession and arranged them in order, and as there are frequently several persons of different degree entitled under any particular kind of succession; therefore, in order to prevent the actions of creditors being delayed, and that they might have some one to sue, and not be too readily put in possession of the goods of the defendant and so enforce their own claims, the Praetor has appointed a definite time for claiming the possession of the goods. To descendants and ascendants, whether natural or adopted, he has granted the space of one year within which possession must be claimed, to all others the space of one hundred days². 9. And when any person has not claimed the possession of the goods within the time, it accrues to the other persons of the same degree; or if there be none at all, it is promised by the successor edict to the other degrees in succession, just as if the

¹ Examples of *bonorum possessio ex lege* are the possession of *caduca* under the Lex Julia and Papia Poppoea, when the childless and unmarried heirs were deprived of their portions for the benefit of those married and having children; also possession granted to the *fiscus*;

Ulpian xxviii. 7. An example of *bonorum possessio ex constitutione* is to be found in D. 38. 17. 2. 9.

² Ulpian xxviii. 10. See also D. 38. 9, where the rules of devolution, which follow in the text, are also set down.

eo numero non esset. si quis itaque delatam sibi bonorum possessionem repudiaverit, non quousque tempus bonorum possessioni prae-finitum excesserit expectatur, sed statim ceteri ex eodem edicto¹ admittuntur. In petenda autem bonorum possessione dies utiles² singuli considerantur. (10.) Sed lene anteriores Principes³ et huic causae providerunt, ne quis pro petenda bonorum possessione curet, sed quocumque modo si admittentis eam indicium intra statuta tamen tempora ostenderit, plenum habeat earum⁴ beneficium,

TIT. X. DE ACQUISITIONE PER ARROGATIONEM.

Est et alterius generis per universitatem successio, quae neque lege duodecim tabularum neque Praetoris edicto, sed

person first entitled had not been in the category. If, therefore, any man has declined the possession of the goods so tendered to him, there is no waiting till the time appointed for that possession has expired, but the others are at once admitted under the same edict¹. Only those days which are *utiles*² are taken into account when possession of the goods has to be claimed. 10. On this subject former emperors³ have also wisely provided that no one need be careful as to *claiming* the possession of the goods, but that he is to have the full benefit thereof if in any way he manifest his intention to accept it⁴, provided he do so within the appointed time,

TIT. X. ON ACQUISITION BY ARROGATION.

There is also another kind of universal succession, which has been introduced neither by any law of the Twelve Tables nor by the Praetor's edict, but by those rules which are re-

¹ Sc. the successory edict.

² *Dies utiles* are those days (1) subsequent to knowledge of the right; (2) during which the party is able to put in his claim; "quibus sciet, poteritque;" (3) on which the law-courts are in session; *dies fasti*. As to *fasti, nefasti*, &c., see our note on C. 11. 279.

³ Constantius issued an edict whereby the formalities formerly needful in an application were

abolished, C. 6. 9. 9. Theodosius and Valentinian legislated to the same effect. Cod. Theod. 4. 1. 1; Nov. Valent. Tertii, 11. 21. 5 in Hugo's *Jus Civile Antejustinianum*.

⁴ *Earum* is the common reading of the MSS., and if correct must have been written through oversight for *ejus* (i.e. *possessionis*): but some very good MSS. have *eorum* (i.e. *bonorum*).

eo iure quod consensu receptum est introducta est. (1.) Ecce enim cum paterfamilias sese in arrogationem dat, omnes res eius corporales et incorporales quaeque ei debitae sunt, arrogatori ante quidem pleno iure acquirebantur, exceptis his quae per capitis deminutionem pereunt, quales sunt operarum obligationes¹ et ius agnationis. usus etenim et usufructus, licet his antea connumerabantur, attamen capitis deminutione minima eos tolli nostra prohibuit constitutio². (2.) Nunc autem nos eandem acquisitionem quae per arrogationem fiebat coartavimus ad similitudinem naturalium parentum: nihil etenim aliud nisi tantummodo usufructus, tam naturalibus patribus quam adoptivis, per filiosfamilias acquiritur in his rebus quae extrinsecus filiis obveniunt, dominio eis integro servato³; mortuo autem filio arrogato in adoptiva familia etiam dominium eius ad arrogatorem pertransit, nisi supersint aliae personae⁴ quae

ceived by general consent. 1. To take an example, when a person *sui juris* gives himself to be arrogated, all his property, incorporeal and corporeal, and all that is due to him, used to be acquired by the arrogator in full title, except those things which perish by a *capitis deminutio*, of which kind are obligations of service¹ and the right of agnation. For an use and an usufruct, although originally reckoned with these, a constitution of ours² has prevented from being destroyed by a *capitis deminutio minima*. 2. At the present time, however, we have restricted the acquisition which used to take place through arrogation in like manner as we have limited the acquisition of the actual parents: for nothing more than an usufruct is acquired through children for the benefit either of actual or adoptive parents in such property as devolves upon the children from strangers, the full ownership being retained for their own benefit³. Still, if the arrogated son die in the adoptive family, the ownership too passes to the arrogator, unless other persons survive who by our constitution have a claim prior⁴ to the

¹ *Operae* were special services reserved as a consideration for the manumission, in addition to the *obsequia*, or duties attaching upon the *libertinus* by mere operation of law, e.g. to furnish ransom for the patron if taken prisoner, to assist in provid-

ing a marriage-portion for his daughter, and to contribute to his expensive law-suits, &c.

² C. 3. 33. 16.

³ C. 6. 61. 6. See II. 9. 1.

⁴ Sc. children or brothers.

ex nostra constitutione patrem in his quae acquiri non possunt antecedunt. (3.) Sed ex diverso, pro eo quod is debuit qui se in adoptionem dedit, ipso quidem iure arrogator non teneatur, sed nomine filii convenietur, et si noluerit eum defendere, permittitur creditoribus per competentes nostros magistratus bona quae eorum cum usufructu futura fuissent, si se alieno iuri non subiecissent, possidere et legitimo modo ea dispo-
nere¹.

TIT. XI. DE EO CUI LIBERTATIS CAUSA BONA ADDICUNTUR.

Accessit novus casus successionis ex constitutione divi Marci. nam si hi qui libertatem acceperunt a domino in testamento ex quo non aditur hereditas², velint bona sibi addici libertatum conservandarum causa, audiuntur. (1.) et ita re-

parent as to those things which cannot be acquired by him.
3. The arrogator is not, on the other hand, liable by the letter of the law for a debt owed by the person who has given himself in arrogation; but he may be sued in the son's name; and if he decline to defend him, the creditors are allowed, under the supervision of our magistrates who have the cognizance, to take into their possession and in lawful manner dispose of all goods which would have been the son's with their usufruct, if he had not subjected himself to the authority of another¹.

TIT. XI. CONCERNING THE PERSON TO WHOM GOODS ARE
ASSIGNED FOR THE MAINTENANCE OF FREEDOM.

A new species of succession has been introduced by a constitution of the late Emperor Marcus: for if persons who have received a grant of freedom from their master in a testament under which no entry is made upon the inheritance², desire the property to be made over to themselves in order that their freedom may be carried into effect, their request is attended to. 1. And this provision is contained in a rescript of Marcus

¹ Gaius III. 82—84.

² If no appointed heir would accept the inheritance, it was first tendered to the heirs *ab intestato*, and on their refusal to the *fiscus*.

And originally it was only in case of the inheritance being rejected on all hands that the provisions of this title came into force.

scripto divi Marci ad Popilium Rufum continetur¹. Verba rescripti ita se habent: Si Virginio Valenti qui testamento suo libertatem quibusdam adscripsit, nemine successore ab intestato existente, in ea causa bona esse coeperunt, ut veniri debeant: is cuius de ea re notio est aditus rationem desiderii tui habebit, ut libertatum, tam earum quae directo, quam earum quae per speciem fideicommissi relictæ sunt, tuendarum gratia addicantur tibi, si idonee creditoribus caveris de solido quod cuique debetur solvendo. et hi quidem quibus directa libertas data est, perinde liberi erunt, ac si hereditas adita esset; hi autem quos heres rogatus est manumittere, a te libertatem consequentur, ita ut, si non alia condicione velis bona tibi addici, quam ut etiam qui directo libertatem acceperunt tui liberti fiant²: nam huic etiam voluntati tuæ,

addressed to Popilius Rufus¹, the wording of which is as follows: "If the property of Virginus Valens, who by his testament gave liberty to certain slaves, is in such plight through there being no successor to him on his intestacy, that it must be sold, the magistrate who has cognizance of the matter shall on application have regard to your request; in such wise that the property shall be assigned to you for the purpose of upholding the gifts of freedom, both those given directly and those given in the form of trust, provided you furnish adequate security to the creditors for the payment in full of the amount due to each. And those to whom there has been a direct gift of freedom shall be free exactly as if entry had been made upon the inheritance; whilst those whom the heir has been requested to manumit shall obtain their liberty at your hands; provided also that if you do not wish the goods to be assigned to you save on this condition, even those who have had a direct grant of freedom shall be your freedmen²; for we grant our sanction also to this request of yours

¹ Referred to in C. 7. 2. 6; C. 7. 2. 15. pr.; D. 40. 5. 2.

² There is obviously something wanting or something superfluous in the text. Some commentators wish

to omit the words *quam ut etiam*, others to insert a second *fiant*: and either of these corrections would lead to the translation we have given.

si hi de quorum statu agitur consentiant, auctoritatem nostram accommodavimus. et ne huius rescriptionis nostrae emolumentum alia ratione irritum fiat, si fiscus bona agnoscere voluerit, et hi qui rebus nostris attendunt scient commodo pecuniario praefendam libertatis causam, et ita bona cogenda, ut libertas his salva sit qui eam adipisci potuerunt, si hereditas ex testamento adita esset. (2.) Hoc rescripto subventum est et libertatibus et defunctis, ne bona eorum a creditoribus possideantur et veneant¹. certe si fuerint ex hac causa² bona addicta, cessat bonorum venditio: extitit enim defuncti defensor³, et quidem idoneus, qui de solido creditoribus cavet. (3.) Inprimis hoc rescriptum totiens locum habet, quotiens testamento libertates datae sunt. Quid ergo si quis intestatus decedens codicillis libertates dederit, neque

if only those whose status is involved are willing. And to prevent you losing the benefit of this rescript in another way, viz. by the *fiscus* determining to claim the goods, those who manage our revenue must take notice that the cause of liberty is to be preferred to our own pecuniary advantage, and that the goods are to be distrained in such manner that freedom be preserved to all persons who would have been able to obtain it if the inheritance had been entered in accordance with the testament." 2. By this rescript relief is given both to the enfranchised and to the defunct, so that the goods of the latter are not taken into possession and sold by the creditors¹. For, undoubtedly, if the goods are assigned for the present reason², the sale of them is prevented: for there is a representative of the deceased³; and a competent one too, inasmuch as he furnishes security to the creditors for the full amount of their claims. 3. This rescript applies directly whenever gifts of freedom are bestowed by testament. What then if a person who is dying intestate confers freedom by a codicil, and the

¹ See next Title.

² Sc. *libertatum servandarum causa*.

³ An estate was never taken and sold (though the circumstances of the case might otherwise justify this proceeding) when the appointed

heir declared his acceptance of the responsibility, or even when a party not originally interested became *defensor*, i.e. accepted the responsibility and furnished sureties to the creditors for their full payment. D. 42. 4. 5. 2.

adita sit ab intestato hereditas? favor constitutionis debet locum habere¹. certe si testatus decedat et codicillis dederit libertatem, competere eam nemini dubium est. (4.) Tunc constitutioni locum esse verba ostendunt, cum nemo successor ab intestato existat: ergo quamdiu incertum sit, utrum existat an non, cessabit constitutio; si certum esse coeperit neminem extare, tunc erit constitutioni locus². (5.) si is qui in integrum restitui³ potest abstinuit se ab hereditate, an, quamvis potest in integrum restitui, potest admitti constitutio et addictio bonorum fieri? quid ergo si post additionem libertatum conservandarum causa factam in integrum sit restitutus? utique non erit dicendum revocari libertates quae semel com-

inheritance on intestacy is not taken up? The benefit of the constitution ought to apply¹. Clearly, if a man die testate and give liberty by a codicil, no one can doubt that the gift is valid. 4. The wording shews that the constitution is applicable when there is no successor on intestacy; and, therefore, so long as it is uncertain whether there will or will not be a successor, the constitution has no application. As soon as it is clear that there can be none, the constitution applies². 5. If a person who can claim a *restitutio in integrum*³ abstains from the inheritance, the constitution may be applied and the assignment take place, although he is entitled to be restored to his full rights. What then is the result, if he be restored to his full rights subsequently to the assignment for the purpose of maintaining the gifts of freedom? Undoubtedly we must decide that the gifts are not to be revoked, when they

¹ D. 40. 5. 2.

² D. 40. 5. 4. pr.: D. 40. 5. 30. 14.

³ Mackelvey defines *restitutio in integrum* as "a subsidiary remedy of the law whereby the Praetor sets aside a transaction valid by the letter of the law, on the petition of one of the parties, because of some manifest wrong caused by it to that party. In ordinary cases a failure of equity was removed by the allowance of an *exceptio* (IV. 13), but when this protection was insufficient, there still might be a *restitutio in integrum*. The chief grounds for granting it were (1)

compulsion, (2) fraud, (3) minority, (4) absence, (5) unavoidable mistake, (6) capitis deminutio, (7) alienation of the matter of dispute in order that an opponent might have to contend with a more powerful adversary. The whole subject is so fully and accurately treated by Mackelvey that we cannot do better than refer those anxious for further information to his elaborate discussion. Mack. *Syst. Jur. Rom.* § 207. See also Zimmer's *Traité des Actions chez les Romains* (traduit par Etienne) Pt. 2, ch. 101, p. 311.

petierunt¹. (6.) Haec constitutio libertatum tuendarum causa introducta est: ergo si libertates nullae sint datae, cessat constitutio. quid ergo si vivus dedit libertates, vel mortis causa², et ne de hoc quaeratur, utrum in fraudem creditorum, an non factum sit³, idcirco velint addici sibi bona, an audiendi sunt? et magis est, ut audiri debeant⁴, etsi deficient verba constitutionis. (7.) Sed cum multas divisiones huiusmodi constitutioni deesse perspeximus, lata est a nobis plenissima constitutio⁵, in quam multae species collatae sunt quibus ius huiusmodi successionis plenissimum est effectum, quas ex ipsa lectione constitutionis potest quis cognoscere.

have once been conferred¹. 6. This constitution was intended to uphold gifts of liberty; and, therefore, if there be no gifts of the kind, it does not apply. Supposing, then, that the master granted freedom by donation *inter vivos* or *mortis causa*², and the slaves request an assignment of the goods to themselves to prevent any investigation whether this was or was not done with the object of defrauding creditors³—are they to have their request granted? It is more consistent⁴ that they should, although the words of the constitution do not meet this case. 7. But as we perceived that many points were left unsettled in the afore-recited constitution, another of a most comprehensive character has been published by ourselves⁵, in which a variety of cases are embraced, whereby the rules of this species of succession are made complete: and these any one may learn by reading the constitution itself.

¹ D. 40. 5. 4. 1 and 2.

² II. 7.

³ Such manumissions *inter vivos* were forbidden by the Lex Aelia Sentia, l. 6. pr., Gaius I. 37.

⁴ For the application of the constitution to testamentary manumissions in fraud of creditors, see D. 40. 5. 4. 19.

⁵ C. 7. 2. 15.

TIT. XII. DE SUCCESSIONIBUS SUBLATIS QUAE FIEBANT
PER BONORUM VENDITIONEM ET EX SENATUSCONSULTO
CLAUDIANO.

Erant ante praedictam successionem olim et aliae per universitatem successiones. Qualis fuerat bonorum emptio quae de bonis debitoris vendendis per multas ambages fuerat introducta¹, et tunc locum habebat, quando iudicia ordinaria in usu fuerunt: sed cum extraordinariis iudiciis posteritas usa est, ideo cum ipsis ordinariis iudiciis² etiam bonorum venditiones expiraverunt, et tantummodo creditoribus datur officio iudicis bona possidere, et prout eis utile visum fuerit, ea disponere, quod ex latioribus digestorum libris perfectius apparebit³. (1.) Erat et ex senatusconsulto Claudiano⁴ miserabilis per

TIT. XII. ON THE ABOLITION OF THE SUCCESSIONS WHICH
USED TO ARISE BY SALE OF A PROPERTY AND BY VIRTUE
OF THE SENATUSCONSULTUM CLAUDIANUM.

There were in times prior to the succession just-mentioned other universal successions. Such was the *bonorum emptio*, which used to be effected with many intricate formalities in cases where the property of a debtor had to be sold¹, and was in vogue at the time when the *iudicia ordinaria* were in use. But as later generations have proceeded by *iudicia extraordinaria*, the *bonorum emptiones* have become obsolete together with the *iudicia ordinaria*²: and creditors are only allowed to take possession of the goods under the authority of a *iudex*, and dispose of them as seems to their view expedient; which topic will become more thoroughly clear by perusal of our larger work, the Digest³. 1. There was also by virtue of the *senatusconsultum Claudianum*⁴ a miserable variety of universal succes-

¹ A full account of the proceedings in an *emptio bonorum* is to be found in Gaius II. 77—81.

² The terms *iudicium ordinarium* and *iudicium extraordinarium* were invented at the time when the usual procedure at Rome in civil cases was by *formulae*, the Praetor remitting the trial of the facts to a *iudex*, or single jurymen. Even at that period some few cases were

tried by the Praetor summarily or without reference to a *iudex*, but this was the extraordinary or unusual process. Diocletian, however, in A.D. 294, made all *iudicia* to be *extraordinaria*. C. 3. 3. ² Gaius gives an ample account of the formulary procedure in IV. 30—60.

³ D. 42. 5.

⁴ Gaius I. 84. 91. 160. The abolition of the S. C. is treated of

universitatem acquisitio, cum libera mulier, servili amore bacchata, ipsam libertatem per senatusconsultum amittebat, et cum libertate substantiam : quod indignum nostris temporibus esse existimantes, et a nostra civitate deleri, et non inseri nostris digestis concessimus.

TIT. XIII. DE OBLIGATIONIBUS.

Nunc transeamus ad obligationes. Obligatio est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura¹. Omnium autem obligationum summa divisio in duo genera deducitur : namque aut civiles sunt, aut praetoriae. civiles sunt quae aut legibus constitutae aut certe iure civili comprobatae sunt. Praetoriae sunt quas Praetor ex sua iurisdictione constituit², quae etiam honorariae vocantur³. Sequens divisio in quatuor species de-

sion, in the case where a free woman, carried away by passion for a slave, lost her liberty under this *senatusconsultum*, and her property with her liberty. But judging this unworthy of our age, we have decided that it shall be abolished from our state and not inserted in our Digest.

TIT. XIII. ON OBLIGATIONS.

Now let us pass on to obligations. An obligation is a tie of law whereby we are put under the necessity of rendering something in accordance with the laws of our state¹. And the main division of all obligations is reduced to two heads ; for obligations are either civil or praetorian. Civil obligations are those created by *leges* or at any rate approved by the civil law. Praetorian obligations are those which the Praetor has established by virtue of his own authority², and they are also called honorary³. A further division is made into four classes ; for

in C. 7. 24, "de senatus consulto Claudiano tollendo."

¹ The concluding words of this definition indicate that no obligation was recognized by the law unless it could be enforced by action.

² The Praetor had two functions,

firstly, his judicial and executive power as an officer of the law, secondly, his legislative, judicial, and executive power as the supreme fountain of equity.

³ See App. L on the classification of obligations.

ducitur: aut enim ex contractu sunt, aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio. Prius est, ut de his quae ex contractu sunt dispiciamus¹. Harum aequae quatuor species sunt: aut enim re contrahuntur, aut verbis, aut literis, aut consensu. de quibus singulis dispiciamus.

TIT. XIV. QUIBUS MODIS RE CONTRAHITUR OBLIGATIO.

Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit quae pondere, numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non haedem res, sed aliae eiusdem naturae et qualitatis reddantur: unde etiam mutuum appellatum est, quia ita a me tibi datur, ut ex meo tuum fiat². ex eo contractu nascitur actio

they originate either from contract, quasi-contract, delict, or quasi-delict. First, then, let us consider those which arise from contract¹. Of these again there are four varieties, for they are founded on (delivery of) the subject, on words, on writing, or on consent. These varieties let us consider separately.

TIT. XIV. IN WHAT WAYS AN OBLIGATION IS CONTRACTED BY DELIVERY OF THE SUBJECT.

An obligation is contracted by delivery, as in the case of a loan to be returned in kind. Which variety of loan applies to matters that are able to be weighed, counted, or measured, such as wine, oil, corn, coin, brass, silver, gold. For these we give by counting, measure or weight, with the intent that they shall become the property of the recipients, and that at some future time not the same things, but others of like nature and quality shall be returned; whence also the article is called *mutuum*, because it is so given by me to you that it becomes yours from being mine². From this contract

¹ A contract is an offer made by one party and accepted by another, to which the law ascribes a binding force by reason of some solemnity superadded, (as delivery, writing,

or a special form of words)—or (in the case of consensual contracts) by treating the intent of the parties as equivalent to a solemnity.

² Gaius III. 90.

quae vocatur *condictio*¹. (1.) Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur; daturque agenti contra eum propter repetitionem *condictitia actio*². nam proinde ei condici potest si paret eum dare oportere, acsi mutuum accepisset. unde pupillus, si ei sine tutoris auctoritate non debitum per errorem datum est, non tenetur indebiti *condictione* magis quam mutui *datatione*. sed haec species obligationis non videtur ex contractu consistere³, cum is qui solvendi animo dat magis distrahere voluit negotium quam contrahere.

2. Item is cui res aliqua utenda datur, id est commodatur, re obligatur, et tenetur *commodati actione*. Sed is ab eo qui mutuum accepit longe distat: namque non ita res datur, ut

arises the action which is called a *condictio*¹. 1. He also who receives a payment not due to him from one who makes the payment by mistake is bound by the delivery: and an *actio condictitia*² is granted to the latter when he proceeds against the former for restitution. For the *condiction* worded "if it appear that he ought to give" can be brought against him, just as if he had received a loan returnable in kind. Therefore a pupil, to whom that which is not due has been given by mistake without authorization of his tutor, is not liable to the *condictio indebiti* any more than he would be if a loan returnable in kind had been bestowed on him. But this species of obligation does not seem to arise from contract³, since he who gives with the intent of paying wishes rather to end a business than to begin one.

2. He, again, to whom any article is given for use, i. e. to whom it is lent, is bound by the delivery, and liable to an *actio commodati*. But such a person differs widely from the receiver of a *mutuum*: for the article is not given him in such wise as to become his own, and therefore he is under obliga-

¹ *Condictio* was originally one of the five forms of *legis actio*, in that earlier method of procedure previous to the formulary system. Gaius tells us (in IV. 19) that this *legis actio* was introduced by the Lex Silia for the recovery of any ascertained sum of money and extended

by the Lex Calpurnia so as to serve to recover any ascertained article.

² This is only another name for *condictio*.

³ The obligation is not *ex contractu*, but *quasi ex contractu*. See III. 27. 6.

eius fiat; et ob id de ea re ipsa restituenda tenetur. et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu, nihilominus obligatus permanet. at is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare iubetur¹, nec sufficit ei tantam diligentiam adhibuisse quantam in suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire; sed propter maiorem vim maioresve casus non tenetur, si modo non huius culpa is casus intervenerit: alioquin si id quod tibi commodatum est peregre tecum ferre malueris, et vel incursu hostium praedonumve vel naufragio amiseris, dubium non est, quin de restituenda ea re tenearis. Commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. alioquin mercede interveniente locatus tibi usus rei videtur²: gratuitum enim debet esse commodatum.

3. Praeterea et is apud quem res aliqua deponitur re ob-

tion to return the selfsame thing. Also the receiver of a *mutuum*, if he lose what he has received by any accidental occurrence, as a fire, the fall of a building, a shipwreck, or the attack of thieves or enemies, still remains bound. But the receiver for use ought undoubtedly to exercise the most perfect care in the custody of the thing¹, nor is it sufficient for him to exhibit the same diligence which he usually shews in his own affairs, provided a more diligent person could have preserved it: yet still he is not liable for overpowering violence or unavoidable mischances—if only the mischance did not come to pass through his fault: although, on the other hand, if you choose to take with you abroad the thing lent you, and lose it either by an attack of enemies, or robbers, or by a shipwreck, there is no doubt as to your being bound to make it good. An article is in strictness considered *lent* when it is given you to use without any hire being taken or bargained for. If, on the contrary, there be a hire, it is considered that the use is *let* to you²: for a loan ought to be gratuitous.

3. He, again, with whom any article is deposited is bound

¹ Gaius III. 206.

² This distinction is very import-

ant, for letting is a consensual contract, lending a real contract; so

ligatur et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur. sed is ex eo solo tenetur, si quid dolo commiserit, culpa¹ autem nomine, id est desidia¹ atque negligentiae, non tenetur¹: itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradidit suae facilitati id imputare debet.

4. Creditor quoque qui pignus accepit re obligatur, qui et ipse de ea re quam accepit restituenda tenetur actione pigneraticia. sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, quod ad eam rem custodiendam exactam diligentiam adhiberet: quam si

by the delivery, and liable to the *actio depositi*, being under obligation to restore that which he has received. But such an one is only responsible for his wilful mischief, and not liable on the score of culpability, that is to say, for sloth and negligence¹: so that a person is safe when he has lost by theft an article which he guarded carelessly; for he who has entrusted his property to a negligent friend ought to ascribe the loss to his own want of caution.

4. A creditor, too, who has received a pledge, is bound by the delivery, and is compelled by an *actio pigneraticia* to restore what he has received. But since a pledge is given for the benefit of both parties, viz. for the debtor's, in order that the money may be lent to him the more readily, and for the creditor's, that his advance may be the better secured; therefore it has been ruled that it is enough for the creditor to use his utmost diligence in preserving the article; and if he has so

that the rules regulating the two are very different. See III. 24.

¹ The general rule in contracts was that the person benefited was liable for *culpa levis*, i.e. for even trivial negligence, whilst the person on whom the burden was cast was only liable for *culpa lata*, i.e. gross negligence. *Dolus*, as one text informs us, means wilful injury; *culpa* damage, which is unintentional,

but still caused by negligence. The depositary would be liable for *dolus* and *culpa lata*. Justinian, therefore, is speaking somewhat inaccurately when he says that the depositary is liable only "si quid dolo commiserit;" but perhaps he had in his mind the well-known maxim, *culpa lata dolo aequiparatur*, in which case his dictum is correct. On the subject of *culpa* see App. M.

praestiterit et aliquo fortuito casu rem amiserit, securum esse, nec impediri creditum petere.

TIT. XV. DE VERBORUM OBLIGATIONE.

Verbis obligatio contrahitur ex interrogatione et responsione, cum quid dari fieri nobis stipulamur. ex qua duae proficiscuntur actiones, tam *condictio* si certa sit stipulatio, quam ex stipulatu, si incerta¹. quae hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

1. In hac re olim talia verba tradita fuerunt: spondes? spondeo; promittis? promitto; fidepromittis? fidepromitto; fideiubes? fideiubeo²; dabis? dabo; facies?

done and yet lost it by some accident, he is clear of blame, and not restrained from suing for his advance.

TIT. XV. ON VERBAL OBLIGATIONS.

An obligation by words is effected by means of a question and answer, when we stipulate for something to be given to us or done for us. From it arise two actions,—a *condictio*, when the stipulation is certain, an *actio ex stipulatu*, when it is uncertain¹. A stipulation is so called from the fact that the ancients used the word *stipulum* to mean *firm*, its derivation, perhaps, being from *stipes* (a tree-trunk).

1. In this kind of contract the following words used to be employed: Do you engage? I do engage: Do you promise? I do promise: Do you become *fidepromissor*? I do become *fidepromissor*: Do you become *fidejussor*²? I do become *fide-*

¹ D. 12. 1. 24.

² Some of the forms here given were employed by the stipulator and promiser, others by the stipulator and the *adpromissor*, or person who guaranteed performance on the part of the principal promiser. They might also be addressed by the *adstipulator* to the promiser or *adpromissor*. An *adstipulator* was a person who received the same promise as the *stipulator*, having

himself no interest in the contract, but being able to receive payment or bring actions on the stipulator's behalf. He was especially useful when the stipulator was absent, ill, or otherwise unable to act at the time when performance became obligatory.

In Gaius' time there were three varieties of *adpromissores*, viz. *sponditores*, *fidepromissores*, and *fidejussores*. The differences between them

faciam. utrum autem Latina an Graeca, vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum huius linguae habeat; nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere; quinetiam duo Graeci Latina lingua obligationem contrahere possunt¹. Sed haec sollemnia verba olim quidem in usu fuerunt; postea autem Leoniana constitutio lata est², quae sollemnitate verborum sublata, sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

jussor: Will you give? I will give: Will you do? I will do. But whether the stipulation be expressed in Latin, or Greek, or any other language is immaterial; provided, of course, that each of the parties to the stipulation understands the language: neither is it necessary for both to use the same language, but it is enough for the answer to correspond with the question: and, further still, two Greeks may enter into an obligation in the Latin language¹. But these solemn words were customary only in ancient times; and afterwards the constitution of Leo was published², which abolished the formality of the wording, and required merely comprehension and coincident intent on both sides, even if expressed in any words whatever.

are fully explained in the commentaries of Gaius, III. 118—127, the chief being as follows: (1) sponsors and fidepromissors could only guarantee verbal obligations, fidejussors engagements of every kind; (2) sponsors and fidepromissors were under a personal liability only, fidejussors transmitted their responsibility to their heirs; (3) sponsors and fidepromissors after the passing of the *Lex Furia* in B.C. 95 were only bound for the space of two years and for a rateable portion, according to the number of them alive when the debt became exigible; fidejussors were for some time after the passing of this *lex* liable severally for the whole amount guaranteed, and when an epistle of Hadrian

(about A.D. 125) divided their liability, it still left them in a worse position than sponsors and fidepromissors, because the debt was divided amongst those who were alive and solvent; (4) by the *Lex Apuleia*, B.C. 102, a sponsor or fidepromissor who had paid more than his proper share could recover the excess from his co-sureties, but a fidejussor could not do so. Hence sponsors and fidepromissors ceased by degrees to be employed, stipulators preferring the more thorough guarantee of fidejussors, and so we find that Justinian in his title "On Sureties," III. 20, treats of the latter alone.

¹ Gaius III. 93.

² C. 8. 38. 10.

2. Omnis stipulatio aut pure, aut in diem, aut sub conditione fit. Pure: veluti; quinque aureos dare spondes? idque confestim peti potest. In diem, cum adiecto die quo pecunia solvatur stipulatio fit: veluti decem aureos primis calendis Martiis dare spondes? id autem quod in diem stipulamur, statim quidem debetur: sed peti prius quam dies veniat non potest; ac ne eo quidem ipso die in quem stipulatio facta est peti potest, quia totus is dies arbitrio solventis tribui debet¹. neque enim certum est eo die in quem promissum est datum non esse, priusquam is praetereat. (3.) At si ita stipuleris, decem aureos annuos, quoad vivam, dare spondes? et pure facta obligatio intellegitur, et perpetuatur, quia ad tempus deberi non potest². sed heres petendo pacti

2. Every stipulation is made either absolutely, or with reference to a date or under a condition. Absolutely, as for instance: Do you engage to give five *aurei*? and then the amount can be demanded at once: with reference to a date, when the stipulation is made with a day specified on which the money is to be paid, as for instance: Do you engage to give ten *aurei* on the next Calends of March? And what we stipulate for with reference to a date is due indeed at once, but cannot be demanded till the date arrives. Nay, it cannot even be demanded on the very day named in the stipulation, because the whole of that day ought to be left to the debtor's discretion¹: for it is not certain that it has not been paid on the day on which it was promised, until that day is past. 3. But if you stipulate thus: Do you engage to give me ten *aurei* a year as long as I live? the obligation is considered to be both absolute and perpetual, because a debt cannot be due for a time². Still the heir when he sues will be defeated by the

¹ III. 19. 26, D. 45. 1. 42.

² The rule is laid down very plainly in D. 44. 7. 44. 1, that a stipulation creates a perpetual obligation, and this leaves it possible to make the obligation *ex die*, for then it is an engagement to pay at any indefinite time after a certain date; but impossible to promise to pay at any time up to a certain date, for

the perpetuity would thus be broken. See for examples D. 45. 1. 16. 1; D. 45. 1. 56. 4. But the Praetor by granting the *exceptio pacti* against any one who sued after the time (as for instance against the heir who claimed the continuance of a personal annuity), caused the agreement to be fulfilled to the letter, and not beyond it.

exceptione si non movebatur. (4.) Sub conditione stipulatio fit, cum in aliquem casum differatur obligatio, ut si aliquid factum fuerit aut non fuerit, stipulatio committatur¹, veluti si Titius Consul factus fuerit, quinque aureos dare spondes? si quis ita stipuletur, si in Capitolium non ascendero, dare spondes? perinde erit, ac si stipulatus esset, cum morietur, dari sibi. ex conditionali stipulatione tantum spes est debita iniri, eamque ipsam spem transmittimus, si priusquam conditio existat, mors nobis contigerit². (5.) Loca etiam inest stipulationi solent, veluti: Carthagine dare spondes? quae stipulatio licet potest fieri videatur, tamen re ipsa habet tempus infectum, quo promissor utatur ad pecuniam Carthagine dandam. et ideo si quis ita Romae stipuletur, hodie Carthagine dare spondes? inutilis erit stipulatio³, cum impossibilis sit

plea of agreement made. 4. A stipulation is made conditionally when the obligation is postponed until some event happens, so that the stipulation becomes binding¹ if something come to pass or do not come to pass: as for instance: Do you engage to give five *aurei* if Titius become consul? If a man stipulate thus: Do you engage to give (the money) if I do not go up to the Capitol? it will be just the same as if he had stipulated that it should be given when he dies. Under a conditional stipulation there is merely a hope that a debt will arise, and we transmit this hope to our heir, if death befall us before the condition comes to pass². 5. Places are often introduced into a stipulation, as for instance: Do you engage to give at Carthage? And this stipulation, though it appears to be made absolutely, has in reality such amount of time implied as the promiser would require in order that the money could be given at Carthage: hence, if a man at Rome stipulate thus: Do you engage to give at Carthage to-day? the stipulation will be void, as the answering promise is impossible³.

¹ See Brissonius sub verbo *committere*.

² See III. 19. 25. The rule was the same as to an absolute stipulation after Justinian's legislation; see III. 19. 13, C. 4. 11; but originally a distinction had been drawn between the two; for it was held that

a person who stipulated for an absolute gift after his own death had wilfully asked for an impossibility; but that one who stipulated for something under a condition, had presumably hoped that the condition would vest in his lifetime.

³ III. 19. 11.

repromissio. (6.) Condiciones quae ad praeteritum vel ad praesens tempus referuntur, aut statim infirmant obligationem, aut omnino non differunt: veluti si Titius Consul fuit, vel si Maevius vivit, dare spondes? nam si ea ita non sunt, nihil valet stipulatio; sin autem ita se habent, statim valet. quae enim per rerum naturam certa sunt non morantur obligationem, licet apud nos incerta sint.

7. Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. Et in huiusmodi stipulationibus optimum erit poenam subiicere, ne quantitas stipulationis in incerto sit, ac necesse sit actori probare, quid eius intersit. itaque si quis, ut fiat aliquid, stipuletur, ita adiici poena debet: si ita factum non erit, tunc poenae nomine decem aureos dare spondes? sed si quaedam fieri, quaedam non fieri, una eademque conceptione stipuletur, clausula erit huiusmodi adiicienda: si adversus ea factum erit, sive quid ita factum non erit, tunc poenae nomine decem aureos dare spondes?

6. Conditions which relate to past or present time either invalidate the obligation at once, or do not postpone it at all; as for instance: Do you engage to give in case Titius has been Consul, or in case Mævius is now alive? for if these things be not so, the stipulation is valueless; and if they be so, it is effectual instantly. For those things which are certain in reality, although uncertain so far as our own knowledge goes, cause no delay in the obligation.

7. Not only can things be the subject of a stipulation, but acts also, as when we stipulate for something to be done or not done. And in stipulations of this description it will be best to tack on a penalty, to prevent the amount involved in the stipulation being uncertain, and consequently the plaintiff obliged to prove the extent of his interest: so that if a person stipulate for something to be done, a penalty ought to be appended as follows: If it be not so done, do you engage to give by way of penalty ten *aurei*? Whilst if he stipulate in one and the same form of words for certain things to be done and certain others not to be done, a clause of the following kind must be added: If anything be done contrary to the present agreement, or if anything be not done in accordance with it, do you then engage to give ten *aurei* by way of penalty?

TIT. XVI. DE DUOBUS REIS STIPULANDI ET PROMITTENDI.

Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat, spondeo, ut puta cum duobus separatim stipulantibus ita promissor respondeat, utrique vestrum dare spondeo: nam si prius Titio sponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio, nec creduntur duo rei stipulandi esse. Duo pluresve rei promittendi ita fiunt: Maevi, quinque aureos dare spondes? Sei, eosdem quinque aureos dare spondes? si respondeant singuli separatim, spondeo. (1.) Ex huiusmodi obligationibus et stipulantibus solidum singulis debetur, et promittentes singuli in solidum tenentur. In utraque tamen obligatione una res vertitur; et vel alter debitum accipiendo, vel alter solvendo, omnium perimit obligationem et omnes liberat. (2.) Ex duobus reis promittendi alius pure, alius in diem, vel sub

TIT. XVI. ON TWO PARTIES TO A STIPULATION OR PROMISE.

Two or more persons may be parties either in a stipulation or a promise. In the stipulation,—when after all have put the question the promiser answers: I engage; for example, when to two separately stipulating the promiser replies: I engage to give to either of you: for if he has first engaged himself to Titius, and then engages himself in reply to the question of another, there are two separate obligations, and it is not considered that there are two parties in one stipulation. Two or more become parties in a promise in the following way: Maevius, do you engage to give five *aurei*? Seius, do you engage to give the same five *aurei*? if each of them replies separately: I engage. 1. In obligations of the characters above described the whole is due to each stipulator, and each promiser is bound for the whole: and yet in either obligation only one thing is involved, and any one party by receiving the debt, or any one by paying it, destroys the obligation of all and sets all free. 2. Of two parties in a promise the one may be bound absolutely, and the other in reference to a date or under a condition: and the date or condition will in no way prevent

condicione obligari potest; nec impedimento erit dies aut condicio, quo minus ab eo qui pure obligatus est petatur.

TIT. XVII. DE STIPULATIONE SERVORUM.

Servus ex persona domini ius stipulandi habet¹. sed hereditas in plerisque personarum² defuncti vicem sustinet: ideoque quod servus hereditarius ante aditam hereditatem stipulatur acquirit hereditati, ac per hoc etiam heredi postea facto acquiritur. (1.) Sive autem domino, sive sibi, sive conservo suo, sive impersonaliter servus stipuletur, domino acquirit. idem iuris est et in liberis qui in potestate patris sunt, ex quibus causis acquirere possunt³. (2.) Sed cum factum in stipulatione continebitur, omnimodo persona stipulantis continetur, veluti si servus stipuletur, ut sibi ire agere liceat⁴: ipse enim tantum prohiberi non debet, non etiam dominus

demand being made against him who bound himself absolutely.

TIT. XVII. ON THE STIPULATION OF SLAVES.

A slave has a right of stipulating in accordance with the civil capacity of his master¹: but an inheritance in general² represents the person of the deceased, and so anything for which a slave stipulates before the inheritance is taken up, he acquires for the inheritance, and thereby it is acquired also for him who subsequently becomes heir. 1. Whether a slave stipulates for his master, or for himself, or for his fellow-slave, or without specification, he acquires for his master. The rule is also the same as to the cases in which descendants under the *potestas* of their ancestor can acquire³. 2. But when the matter of stipulation is an act, the person of the stipulator is in all cases the one concerned; for example, when a slave stipulates that he shall have the right of *iler* or *actus*⁴: for it is he only

¹ The slave may stipulate or not stipulate under the same circumstances precisely as his master.

² Not in all cases; for instance, the *servus hereditarius* could not acquire an usufruct, that right being a personal one and attaching to the

master, D. 41. 1. 61.

³ IV. 7. pr.

⁴ This cannot signify the praedial servitude, which was always attached to the ownership of land (see II. 3. 3), but means a personal right of passage.

eius. (3.) Servus communis stipulando unicuique dominorum pro portione domini acquirit, nisi si unius eorum iussu¹, aut nominatim cui eorum stipulatus est: tunc enim soli ei acquiritur. quod servus communis stipulatur, si alteri ex dominis acquiri non potest, solidum alteri acquiritur, veluti si res quam dari stipulatus est unius domini sit².

TIT. XVIII. DE DIVISIONE STIPULATIONUM.

Stipulationum aliae iudiciales sunt, aliae praetoriae, aliae conventionales, aliae communes, tam praetoriae, quam iudiciales. (1.) Iudiciales sunt dumtaxat, quae a mero iudicis officio proficiscuntur³: veluti de dolo cautio, vel de perse-

and not his master who is not to be impeded. 3. A slave owned in common acquires by his stipulation for each of the masters in proportion to his share of ownership, unless he has stipulated by order of one of them or specially for one of them¹; for then he acquires for that one only. If the subject of the common slave's stipulation cannot be acquired for one of his owners, the whole is acquired for the other: for instance, when the article for which he has stipulated belongs to one of them².

TIT. XVIII. ON THE CLASSIFICATION OF STIPULATIONS.

Some stipulations are judicial, some praetorian, some conventional, some common, i.e. both praetorian and judicial. 1. Stipulations merely judicial are those which originate simply from the function of the *judex*³, as the security against fraud,

¹ The effect of an order had been disputed in Gaius' time. See Gaius III. 167. a.

² III. 19. 22.

³ I.e. which the *judex* requires as a matter of course. For example, when he made an order that a slave should be delivered up by the defendant to the plaintiff, he added as of course a stipulation *de dolo*, to the end that the slave might be delivered in sound condition; D. 4. 3. 7. 3; and that accessories which had accrued during the un-

lawful detention should go with the principal; D. 6. 1. 20 and 45. In the case where the slave had been sold and ran away before delivery, the stipulation "*de persequendo, restituendove pretio*" would equally as a matter of course be insisted on, and the effect of it was that the price must be restored if the vendor had been guilty of negligence in guarding him or did not make all reasonable efforts for his recovery. D. 4. 2. 14. 11; D. 6. 1. 21. &c.

quando servo qui in fuga est, restituendove pretio. (2.) Praetoriae, quae a mero Praetoris officio proficiscuntur, veluti damni infecti¹, vel legatorum². praetorias autem stipulationes sic exaudiri oportet, ut in his contineantur etiam aedilitiae: nam et hae ab iurisdictione veniunt. (3.) Conventionales sunt quae ex conventionem utriusque partis concipiuntur, hoc est neque iussu iudicis neque iussu Praetoris, sed ex conventionem contrahentium. quarum totidem genera sunt, quot—paene dixerim—rerum contrahendarum. (4.) Communes sunt stipulationes, veluti rem salvam fore pupilli³. nam et Praetor

or that a slave who has fled shall be pursued or his price paid. 2. The praetorian are those which originate purely from the function of the Praetor, as the security against threatened damage¹ or for payment of legacies². The praetorian stipulations must be understood to comprehend the aedilitian also: for these too arise from the right of jurisdiction. 3. The conventional are those which are derived from the agreement of the two parties, that is neither from the order of the *iudex*, nor from the order of the Praetor, but from the agreement of the contractors. Hence, there are as many varieties of them, I may almost say, as there are of subjects which can be matters of contracts. 4. Common stipulations are such as the one which provides that the property of a pupil shall be secured³: for on the one hand the Praetor lays down a rule that security shall be given to the pupil for the preservation of his property, and on

¹ The actual words of the edict *de damno infecto* are quoted in D. 39. 2. 7. pr. The Praetor insisted on security being given, lest damage should ensue, and the owner of the article causing the mischief should evade liability by abandoning his ownership. If the security were refused, the complainant was put in possession of the article and took measures to protect his interests. This was called the *missio ex primo decreto*, and the detention under it could be continued until the owner repaid the expenses incurred and entered into the stipulation *de damno infecto*. If he still remained

obstinate, the detention was turned into juridical possession by another order, termed *missio ex secundo decreto*, and usucaption began to run. The Praetor further granted an action for the amount which ought to have been assured, if damage actually took place without fault or negligence on the part of the possessor. See D. 39. 2. 37: Mackeldey. *Syst. Jur. Rom.* § 484.

² D. 36. 3.

³ I. 24. The Praetor ought to have ordered the stipulation to be made before the tutor entered on his duties; but if he had neglected to do so, the *iudex* in any case where the

iubet rem salvam fore pupillo caveri, et interdum iudex, si aliter expediri haec res non potest; vel de rato stipulatio¹.

TIT. XIX. DE INUTILIBUS STIPULATIONIBUS.

Omnis res quae dominio nostro subiicitur in stipulationem deduci potest, sive illa mobilis sive soli sit. (1.) At si quis rem quae in rerum natura non est aut esse non potest dari stipulatus fuerit, veluti Stichum qui mortuus sit, quem vivere credebat, aut hippocentaurum qui esse non possit, inutilis erit stipulatio. (2.) Idem iuris est, si rem sacram aut religiosam quam humani iuris esse credebat, vel publicam quae usibus populi perpetuo exposita sit, ut forum vel theatrum, vel liberum hominem quem servum esse credebat, vel cuius commercium non habuerit, vel rem suam dari quis stipuletur². nec in pendente erit stipulatio ob id, quod publica res in

the other the *iudex* sometimes does the like, if the rule cannot otherwise be carried into effect: of like kind again is the stipulation for ratification¹.

TIT. XIX. ON USELESS STIPULATIONS.

Everything which is subject to our ownership can be made a matter of stipulation, whether it be moveable or immoveable. 1. But if any one have stipulated for a thing which is not existent or cannot be existent, as for instance, for Stichus who is dead, but whom he imagined to be alive, or for a hippocentaur, which cannot exist, the stipulation will be void. 2. The rule is the same, if a man stipulate for a sacred or religious thing which he imagined to be a subject of commerce, or for public property devoted for ever to the service of the people, as a forum or a theatre, or for a freeman whom he fancied to be a slave, or for a thing with which he cannot deal, or for his own property to be given to him²: neither will the stipulation be in suspense because of the possibility that public property may be

tutor was plaintiff or defendant might insist on the omission being supplied.

¹ A procurator before commencing a suit ought to engage that his principal will ratify his acts. If the

Praetor neglected to enforce this rule, the *iudex* could insist on the stipulation being made before ordering the debtor to make payment to the procurator. See IV. 10 and 11.

² Gaius III. 97, 99; IV. 4.

privatam deduci, et ex libero servus fieri potest, et commercium adipisci stipulator potest, et res stipulatoris esse desinere potest: sed protinus inutilis est. item contra, licet initio utiliter res in stipulatum deducta sit, si postea in earum qua causa, de quibus supra dictum est, sine facto promissoris devenierit: extinguetur stipulatio. ac ne statim ab initio talis stipulatio valebit, Lucium Titium, cum servus erit, dare spondes? et similia: quia quae natura sui dominio nostro exempta sunt in obligationem deduci nullo modo possunt¹.

3. Si quis alium daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat Titium quinque aureos daturum. quodsi effecturum se, ut Titius daret, spoponderit, obligatur.

4. Si quis alii quam cuius iuri subiectus sit stipuletur, nihil agit². plane solutio etiam in extranei personam conferri potest

come private, or that a freeman may become a slave, or that the stipulator may obtain the right of dealing with the article, or that the thing may cease to be his own property: but it is void at once. So, on the other hand, although originally a thing may have been validly made the subject of a stipulation, yet if it afterwards fall into any of the classes above named without act on the part of the promiser, the stipulation is made void. And further, a stipulation is invalid from the very outset when worded thus: Do you engage to give Lucius Titius whenever he shall become a slave? or the like: for those things which by their nature are exempt from our ownership cannot in any way be made matters of obligation¹. 3. If a man engage that another shall give or do something, he will not be bound; for instance, if he engage that Titius shall give five *auri*: although, if he engage that he will cause Titius to give them, he is bound. 4. If a man stipulate for the benefit of any one, other than a person to whose authority he is subject, he does a void act². But it may be arranged that payment shall be made to a

¹ "Those things only which are possible by their nature may be made matters of obligation.....and we may only deal with things which can *at once* be subject to our use and ownership." D. 45. 1. 83. 5.

² III. 28. Gaius III. 103. The proposed beneficiary, not being a party to the contract, had no action to enforce it; neither had the stipulator, because he again had no interest in the fulfilment.

(veluti si quis ita stipuletur : mihi aut Seio dare spondes?); ut obligatio quidem stipulatori acquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso iure contingat, sed ille adversus Seium habeat mandati actionem¹. quodsi quis sibi et alii cuius iuri subiectus non sit, dari decem aureos stipulatus est, valebit quidem stipulatio : sed utrum totum debeatur quod in stipulationem deductum est, an vero pars dimidia, dubitatum est²; sed placet non plus quam partem dimidiam ei acquiri. Ei qui tuo iuri subiectus est si stipulatus sis, tibi acquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua intellegitur in his rebus quae tibi acquiri possunt³. 5. Praeterea inutilis est stipulatio, si quis ad ea quae interrogatus erit non respondeat, veluti si decem aureos a te dari stipuletur, tu quinque promittas, vel contra⁴; aut si ille pure stipuletur, tu sub condicione promittas, vel contra; si modo

stranger; for instance when a man stipulates thus: Do you engage to give to me or Seius? so that the obligation is created for the benefit of the stipulator, and yet payment may be lawfully made to Seius even against the stipulator's wish; and thereupon an acquittance takes place by operation of law, whilst the stipulator has an action of mandate against Seius¹. But when any person has stipulated for ten *aurei* to be given to himself and another to whose authority he is not subject, the stipulation will be good; though whether the whole amount declared in the stipulation is due to him, or only a half, has been a matter of doubt²: but it is now settled that no more than a half is acquired for him. If you have stipulated on behalf of a person subject to your authority, you acquire for yourself; because your words are, as it were, those of your son; just as the words of your son are considered to be yours in reference to those matters which can be acquired for your benefit³. 5. Again, the stipulation is void, if a man do not reply to the question he is asked; for instance if one stipulate for ten *aurei* to be given by you, and you promise five⁴, or vice versa; or if he stipulate absolutely, and you promise under a condition, or

¹ III. 26.

² Gaius III. 103.

³ "Patris vel domini voce loqui videntur;" § 13 below.

⁴ Ulpian states the exact con-

trary in D. 45. 1. 1. 4; and Pomponius also in D. 46. 4. 15; their doctrine being clearly more accordant with the principle laid down in § 18 below.

scilicet id exprimas, id est si cui sub condicione vel in diem stipulanti tu respondeas: praesenti die spondeo. nam si hoc solum respondeas, promitto, breviter videris in eandem diem aut condicionem spopondisse¹: nec enim necesse est in respondendo eadem omnia repeti quae stipulator expresserit. 6. Item inutilis est stipulatio, si ab eo stipuleris qui iuri tuo subiectus est, vel si is a te stipuletur. sed servus quidem non solum domino suo obligari non potest, sed ne alii quidem ulli²; filii vero familias aliis obligari possunt. 7. Mutum neque stipulari neque promittere posse palam est. Quod et in surdo receptum est: quia et is qui stipulatur verba promittentis, et is qui promittit, verba stipulantis audire debet³. unde apparet non de eo nos loqui qui tardius exaudit sed de eo qui omnino non exaudit⁴. (8.) Furiosus nulum negotium gerere potest, quia non intellegit quid agit⁵.

vice versa; provided only that you specify this, i.e. that, in reply to one who stipulates under a condition or for a particular day, you answer: I promise for to-day. For if you merely reply: I promise, you are considered to have engaged yourself in a brief form for the date or under the condition named¹: since it is not necessary that the phrases used by the stipulator should be stated afresh in the answer. 6. Again, a stipulation is void, if you stipulate for payment from one who is subject to your authority, or if he stipulate for payment from you. But a slave not only can be under no obligation to his master, but not even to any one else²; whereas a *filiusfamilias* can be under obligation to other people. 7. That a dumb man can neither stipulate nor promise is plain. Which is the rule also as to a deaf man: because he who stipulates ought to hear the words of the promiser, and he who promises the words of the stipulator³. Hence it is obvious that we are not speaking about one who hears with difficulty, but about one who does not hear at all⁴. 8. A madman can transact no business, because he does not understand what he is about⁵.

¹ See Cic. *pro Caecina*, 3: "Quod spopondit, qua in re verbo se uno obligavit."

² Gaius III. 104, 176, 179.

³ Gaius III. 105.

⁴ II. 12. 3.

⁵ Gaius III. 106.

(9.) Pupillus omne negotium recte gerit : ita tamen ut, sicubi tutoris auctoritas necessaria sit, adhibeatur tutor, veluti si ipse obligetur ; nam alium sibi obligare etiam sine tutoris auctoritate potest. (10.) Sed quod diximus de pupillis, utique de his verum est qui iam aliquem intellectum habent : nam infans et qui infanti proximus est non multum a furioso distant, quia huius aetatis pupilli nullum intellectum habent ; sed in proximis infanti propter utilitatem eorum benignior iuris interpretatio facta est, ut idem iuris habeant quod pubertati proximi¹. Sed qui in parentis potestate est impubes nec auctore quidem patre obligatur². 11. Si impossibilis condicio obligationibus

9. A pupil can legally transact any business, provided that his tutor be present in cases when the tutor's authorization is necessary ; for instance, when the pupil binds himself ; for he can bind another to himself even without the authorization of the tutor. 10 But what we have said regarding pupils is only true as to those who have already some understanding : for an infant and one almost an infant do not differ much from a madman, because pupils of this age have no understanding : still through a regard for their interests a somewhat lenient construction of the law has been made in reference to those almost infants, namely, that they are to have the same rights as those almost of puberty¹. But a person under puberty and subject to parental *potestas* cannot be bound even with his father's authorization². 11. If an impossible condition be

¹ That is, although they have little or no understanding, their stipulations or promises backed by the tutor's authorization are binding. Gaius III. 107, 109. The precise meanings of *infanti proximus* and *pubertati proximus* are much disputed. Savigny's idea seems to be that a child under seven is *infanti proximus*, and one between seven and fourteen *pubertati proximus*. See Savigny on *Possession*, translated by Perry, p. 180, note (b). Another view is that *infantia* continues to the age of seven, and that the succeeding period up to fourteen years of age is divided into three portions, a

child being *infanti proximus* from seven to nine, *impubes* simply from nine to eleven or twelve, and *pubertati proximus* for the rest of his time up to fourteen. This notion is based on a statement of Servius ad *Virgil. Aen.* v. 295, that there was a *divisio trifaria* both of *infantia* and *pueritia*. Another explanation is put forward by Thibaut in his *System. des Pand. Rechts*. See Linley's translation, § 121, pp. 117, 118.

² D. 45. 1. 141. 2. The pupil who had been injured by the act of his tutor had a remedy against him, viz. the *actio tutelae*, when he arrived at puberty ; but a son had no



adiiciatur, nihil valet stipulatio¹. impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, veluti si quis ita dixerit: si digito caelum attigero, dare spondes? at si ita stipuletur, si digito caelum non attigero, dare spondes? pure facta obligatio intellegitur, ideoque statim petere potest. 12. Item verborum obligatio inter absentes concepta inutilis est. sed cum hoc materiam litium contentiosis hominibus praestabat, forte post tempus tales allegationes opponentibus, et non praesentes esse vel se vel adversarios suos contendentibus: ideo nostra constitutio² propter celeritatem dirimendarum litium introducta est, quam ad Caesarienses advocatos scripsimus, per quam disposuimus tales scripturas quae praesto esse partes indicant omnimodo esse credendas, nisi ipse qui talibus utitur improbis allegationibus manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit,

attached to an obligation, the stipulation is void¹. And a condition is regarded as impossible when nature prevents its fulfilment, as for instance, when a man says: Do you engage to give if I touch heaven with my finger? but when he stipulates thus: Do you engage to give if I do not touch heaven with my finger? the stipulation is considered to be absolute, and therefore performance can be demanded immediately. 12. Again, a verbal obligation is void when made between parties who are not each in the presence of the other. But as this rule gave occasion to suits by litigious persons, who, perhaps after some time had elapsed, set up allegations of this character and maintained that either they or their opponents were not present; a constitution addressed to the advocates of Caesarea has been issued by us for the speedy settlement of these suits², in which we have provided that writings which declare the parties to have been present are to be credited in all cases, unless the person who makes such shameless assertions can establish by the clearest proofs, either by writing or by

remedy against his father. Hence the difference stated in the text.

¹ Gaius III. 98.

² C. 8. 38. 14. It was customary, but not absolutely necessary,

to put the terms of a stipulation into writing, as we see from Cic. *pro Rosc. Com.* 13, where a "restipulationis scriptor" is mentioned.

in ipso toto die quo conficiebatur instrumentum sese vel adversarium suum in aliis locis esse. 13. Post mortem suam dari sibi nemo stipulari poterat, non magis quam post mortem eius a quo stipulabatur¹. ac ne is qui in alicuius potestate est post mortem eius stipulari poterat, quia patris vel domini voce loqui videtur. Sed et si quis ita stipuletur, pridie quam moriar, vel pridie quam morieris dabis? inutilis erat stipulatio. Sed cum (ut iam dictum est²) ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc iuris articulum necessariam inducere emendationem³, ut sive post mortem, sive pridie quam morietur stipulator sive promissor, stipulatio concepta est, valeat stipulatio. 14. Item, si quis ita stipulatus erat, si navis ex Asia venerit, hodie dare spondes? inutilis erat stipulatio, quia praepostere concepta est⁴. sed cum Leo, inclutae recordatio-

credible witnesses, that he or his opponent was in another place during the whole of that day on which the document was drawn up. 13. No one formerly could stipulate for a thing to be given after his own death, any more than after the death of the person from whom he stipulated¹. Neither could anyone under the *potestas* of another stipulate that it should be given after the death of that other, because he is considered to speak with the voice of his father or master. Moreover, if he stipulated in the words: Will you give it on the day before I die, or on the day before you die? the stipulation was void. But since stipulations are binding because of the consent of the parties (as has been stated previously²), we have decided to introduce a necessary alteration into this branch of the law³, so that the stipulation now stands good whether it be worded "after the death" or "on the day before the death of the stipulator or promiser." 14. Likewise, when anyone has stipulated in these terms: Do you engage to give to-day, if a ship shall hereafter come from Asia? the stipulation will be void, because arranged preposterously⁴. But as Leo of glo-

¹ Gaius III. 100.

² Probably he refers to the latter part of III. 15. 1, or to III. 18. 3.

³ C. 8. 38. 11.

⁴ "Preposterous" is the name applied to the stipulation, because what ought to come first, namely, the fulfilment of the condition, is

nis, in dotibus eandem stipulationem quae praepostera nuncupatur non esse reiiciendam existimavit, nobis placuit et huic perfectum robur accommodare, ut non solum in dotibus, sed etiam in omnibus valeat huiusmodi conceptio stipulationis¹. (15.) Ita autem concepta stipulatio, veluti si Titius dicat, cum moriar, dare spondes? vel cum morieris, et apud veteres utilis erat, et nunc valet². (16.) Item post mortem alterius recte stipulamur. (17.) Si scriptum fuerit in instrumento promississe aliquem, perinde habetur, atque si interrogatione praecedente responsum sit. (18.) Quotiens plures res una stipulatione comprehenduntur, si quidem promissor simpliciter respondeat dare spondeo, propter omnes tenetur; si vero unam ex his vel quasdam daturum se spondeat, obligatio in his pro quibus spoponderit contrahetur. ex pluribus enim stipulationibus una vel quaedam videntur esse perfectae: singulas enim res stipulari et ad singulas respondere debemus³.

rious memory decided that this same species of stipulation, styled preposterous, should not be treated as null when it had reference to marriage-portions, we have decided to give it universal validity, so that such mode of wording a stipulation is good not only in relation to marriage-portions but in all cases¹. 15. A stipulation worded as follows was held by the old authorities to be valid and is valid now; for instance, where Titius says "Do you engage to give when I shall be dying, or when you shall be dying?" 16. We further stipulate lawfully for something (to be given or done) after the death of a third party. 17. If it be stated in a document that a man has made a promise, this is considered to be the same as if his answer had been given to a precedent question. 18. When several matters are comprehended in one stipulation, the promiser is bound for all, if he simply make answer: I engage to give. But if he answer that he will give one or a specific number of them, an obligation is contracted as to those for which he engaged himself: for out of the many stipulations one or a specific number is considered to be perfected; since we ought to stipulate for matters singly and reply to them singly². 19. No one, as we

instead made subsequent to the performance of the engagement.

¹ C. 6. 23. 25.

² The reason for this decision is given in Gaius II. 232.

³ See to the same effect, D. 45.

(19.) Alteri stipulari, ut supra dictum est¹, nemo potest: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi acquirat quod sua interest²; ceterum, si alii detur, nihil interest stipulatoris. plane si quis velit hoc facere, poenam stipulari conveniet, ut nisi ita factum sit, ut comprehensum est, committetur poenae stipulatio etiam ei cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit eius, sed quae sit quantitas in condicione stipulationis. ergo si quis stipuletur Titio dari, nihil agit, sed si addiderit poenam, nisi dederis, tot aureos dare spondes? tunc committitur stipulatio. (20.) Sed et si quis stipuletur alii, cum eius interesset, placuit stipulationem valere. nam si is qui pupilli tutelam administrare coeperat cessit administratione contutori suo, et stipulatus est rem pupilli salvam

have already stated¹, can stipulate for the benefit of another: for obligations of this kind have been invented to the end that any person may acquire what is for his own benefit²; whereas there is no benefit to the stipulator in a gift being made to another man. Clearly then, if any one wish to effect this, it will be necessary for him to stipulate for a penalty; so that if performance should not take place as provided, the stipulation for the penalty may vest on behalf of himself, although he has (originally) no interest in the matter: for when a person stipulates for a penalty, we do not consider what his (original) interest is, but what is the amount involved in the condition of the stipulation. Therefore, if any one stipulate for a gift to be made to Titius, he does a void act: but if he add by way of penalty: Unless you give, do you engage to give me so many *aurei*? then a stipulation is contracted. 20. Still, if any one stipulate for the benefit of another, being also himself interested, it has been decided that the stipulation is good. For if any one, after commencing to administer the tutelage of a pupil, cedes the administration to his fellow-tutor, and stipulates that the property of the pupil shall be secured, the stipu-

1. I. 5, D. 45. I. 29. pr., D. 45. I. 83. 2—4, D. 45. I. 86, &c.

¹ In § 4 above.

² This rule only applies to obli-

gations *stricti juris*. It was otherwise with regard to *bonae fidei* obligations, such as mandate; see III. 26. 3.

fore, quoniam interest stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo, si male res gesserit, tenet obligatio¹. ergo et si quis procuratori suo dari stipulatus sit, stipulatio vires habebit². et si creditori suo quod sua interest, ne forte vel poena committatur, vel praedia distrahantur quae pignori data erant, valet stipulatio. (21.) Versa vice qui alium facturum promisit videtur in ea esse causa, ut non teneatur, nisi poenam ipse promiserit. (22.) Item nemo rem suam futuram in eum casum quo sua fit utiliter stipulatur³. (23.) Si de alia re stipulator senserit, de alia promissor, perinde nulla contrahitur obligatio, ac si ad interrogatum responsum

lation holds good; since it is to the stipulator's interest that what he has stipulated shall be carried out, seeing that he would be answerable to the pupil for bad management¹. Hence also, if any one stipulate for something to be given to his *procurator*², the stipulation will be valid: and if he stipulate for it to be given to his creditor, having himself an interest in the gift, as, for instance, that a penalty may be avoided thereby, or that lands given in pledge may not be sold, the stipulation is valid. 21. In the converse case, a person who has promised that another shall do something is considered to be under no obligation, unless he has personally promised a penalty. 22. No one, again, can stipulate that a thing shall become his property under those circumstances which of themselves make it his³. 23. If the stipulator intend one thing and the promiser another, no obligation is contracted, any more

¹ This example is quoted from Marcellus by Ulpian in D. 45. 1. 38. 20; but the fact of the tutor having "begun to administer" is immaterial. The tutorship could not be declined without cause (I. 25), and so a tutor who never acted at all might be equally liable; see D. 26. 7. 55. pr.

² IV. 10. 1. The principal in this case plainly has an interest, because by an *actio mandati* he can make the *procurator* refund anything which he receives.

³ Quoted from Paulus in D. 45. 1. 87. A man can stipulate that a thing which will in any case become

his at a future day, shall become his at once; for the acceleration of ownership is an obvious benefit. But he cannot stipulate that what is already his shall become his (see § 2): and on the selfsame principle he cannot stipulate that a thing shall become his under certain circumstances, when by some prior arrangement it has been settled that those circumstances shall confer it upon him. The latter stipulations are both of them void, for there is no subject on which they can operate. See D. 45. 1. 31; D. 45. 1. 98. pr.

non esset¹, veluti si hominem Stichum a te stipulatus quis fuerit, tu de Pamphilo senseris, quem Stichum vocari credideris. (24.) Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

25. Cum quis sub aliqua condicione fuerit stipulatus, licet ante condicionem decesserit, postea existente condicione, heres eius agere potest. Idem est et a promissoris parte. (26.) Qui hoc anno aut hoc mense dari stipulatus sit, nisi omnibus partibus praeteritis anni vel mensis, non recte petet. (27.) Si fundum dari stipuleris vel hominem, non poteris continuo agere, nisi tantum spatii praeterierit quo traditio fieri possit.

TIT. XX. DE FIDEIUSSORIBUS.

Pro eo qui promittit solent alii obligari, qui fideiussores appellantur, quos homines accipere solent, dum curant, ut diligentius sibi cautum sit².

1. In omnibus autem obligationibus assumi possunt, id est

than if the answer did not relate to the question¹; for example, if a person stipulated for the slave Stichus to be given by you, and you were thinking of Pamphilus, whom you supposed to be called Stichus. 24. A promise based upon a disgraceful consideration is invalid, as for example when a man undertakes to commit murder or sacrilege.

25. When a person has stipulated under some condition, his heir can sue on the accomplishment of the condition, even though the stipulator be previously dead. So too in relation to the promiser. 26. He who has stipulated for something to be given this year or this month, cannot legally sue for it till every portion of the year or month is past. 27. If you stipulate for the gift of a field or a slave, you cannot sue at once, but only when sufficient time has elapsed for the delivery to have been made.

TIT. XX. ON FIDEJUSSORS.

Other persons frequently bind themselves on behalf of a promiser, and these are called fidejussors: and people are in the habit of taking them to make certain that they are adequately secured².

¹ D. 45. 1. 137. 1.

² Gaius III. 115, 117.

sive re sive verbis sive literis sive consensu contractae fuerint. at ne illud quidem interest, utrum civilis an naturalis sit obligatio cui adiciatur fideiussor; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui fideiussorem a servo accipiat, sive ipse dominus in id quod sibi naturaliter debetur¹. (2.) Fideiussor non tantum ipse obligatur, sed etiam heredem obligatum relinquit. (3.) Fideiussor et praecedere obligationem et sequi potest. (4.) Si plures sint fideiussores, quotquot erunt numero, singuli in solidum tenentur. itaque liberum est creditori a quo velit solidum petere. Sed ex epistola divi Hadriani compellitur creditor a singulis, qui modo solvendo sint litis contestatae tempore², partes petere. ideoque,

1. Fidejussors can be attached to obligations of any kind, i. e. whether contracted by delivery of the subject, by words, by writing or by consent. Nor does it at all matter whether it be a civil or a natural obligation to which the fidejussor is attached; so that he can be bound even on behalf of a slave, whether the receiver of the fidejussor from the slave be a stranger, or the slave's own master in respect of that which is due to him naturally¹. 2. Not only is a fidejussor under obligation personally, but he also leaves his heir bound. 3. A fidejussor may engage himself either before or after the (principal) obligation. 4. If there be several fidejussors, they are each liable for the full amount, whatever their number be; and so it is allowable for the creditor to demand the whole from any one of them he pleases. But according to an epistle of the late emperor Hadrian, the creditor is compelled to sue for a proportional part from each, i. e. each of those solvent at the time of the *litis contestatio*²: and therefore if any one of the

¹ Gaius III. 119.

² The *litis contestatio* under the formulary system of action was at the moment when the Praetor issued the formula to the *judex*. The proceedings in an action were divided into two portions, those *in jure* and those *in judicio*. The preliminary proceedings were *in jure*, i. e. before the Praetor and comprised the *editio actionis*, or preliminary notice of the plaintiff, the *postulatio* or specific demand for a *formula*, and

the hearing on the application. At the hearing the parties, without entering into evidence, stated their allegations and pleas, and when the actual issue had been settled the *formula* was granted, supposing the issue to be one of fact. If it were of law, no *formula* was needed, the Praetor himself disposing of the case. As soon as the *formula* was granted the proceedings passed from the first to the second stage, ceased to be *in jure* and became *in judicio*.

si quis ex fideiussoribus eo tempore solvendo non sit, hoc ceteros onerat. sed et si ab uno fideiussore creditor totum consecutus fuerit, huius solius detrimentum erit, si is pro quo fideiussit solvendo non sit: et sibi imputare debet, cum poterit adiuvari ex epistola divi Hadriani et desiderare, ut pro parte in se detur actio¹.

5. Fideiussores ita obligari non possunt, ut plus debeant quam debet is pro quo obligantur: nam et eorum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re. at ex diverso ut minus debeant, obligari possunt². Itaque si reus decem aureos promiserit, fideiussor in quinque recte obligatur; contra vero non potest obligari. item si ille pure promiserit, fideiussor sub condicione promittere potest; contra vero non potest. non solum enim in quantitate, sed etiam in tempore minus et plus

fidejussors be insolvent at that time, this fact augments the burden of the rest. But if the creditor have recovered the whole amount from one fidejussor, the loss falls on this one alone, supposing the person for whom he became fidejussor be insolvent; and he ought to blame himself, since he could have been relieved by the epistle of the late emperor Hadrian, and have demanded that the action should be allowed against him for his share only¹.

5. Fidejussors cannot bind themselves in such wise as to owe more than is owed by the person for whom they are bound: for their obligation is an accessory to the principal obligation, and there cannot be more in the accessory than in the principal thing: but on the other hand they may bind themselves so as to owe less². Hence, if the principal debtor have promised ten *aurei*, the fidejussor lawfully binds himself for five: but he cannot bind himself the other way. Likewise if the debtor have bound himself absolutely, the fidejussor may

There was no longer an opportunity for peaceable accommodation, and the decision was left entirely to the operation of law. See App. (O) to our edition of Gaius. When *judicia extraordinaria* supplanted *judicia ordinaria*, or, in other words, when *formulae* were no longer issued by the magistrate, the *litis contestatio* was the instant when the plaintiff

had concluded his recital and the defendant had denied the allegation or put in a plea in justification. C. 3. 1. 14. 1: C. 3. 9. 1. On *judicia extraordinaria*, see App. Q.

¹ Gaius III. 121, 122.

² Gaius III. 126. Another example of the same principle is to be found in Gaius III. 113.

intellegitur. plus est enim statim aliquid dare; minus est, post tempus dare. (6.) Si quis autem fideiussor pro reo solverit, eius recipiendi causa habet cum eo mandati iudicium¹.

7. Graece fideiussor ita accipitur: τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω, sive βούλομαι; sed et si φημί dixerit, pro eo erit ac si dixerit λέγω. (8.) In stipulationibus fideiussorum sciendum est generaliter hoc accipi, ut quodcumque scriptum sit quasi actum, videatur etiam actum: ideoque constat, si quis se scripserit fideiussisse, videri omnia sollemniter acta.

TIT. XXI. DE LITTERARUM OBLIGATIONE.

Olim scriptura fiebat obligatio quae nominibus fieri dicebatur, quae nomina hodie non sunt in usu². Plane si quis debere se scripserit quod ei numeratum non est, de pecunia minime numerata post multum temporis exceptionem opponere

promise conditionally; but not the other way: for the terms, less and more, are considered to refer not only to quantity but to time as well: for a prompt gift is more valuable than one which is delayed. 6. When a fidejussor has made a payment on behalf of the principal debtor he has an action of mandate against him for its recovery¹.

7. A fidejussor binds himself in Greek as follows: τῇ ἐμῇ πίστει κελεύω (I order upon my credit), λέγω (I say), θέλω (I wish), or βούλομαι (I desire); and even if he uses the word φημί, it will be the same as if he said λέγω. 8. We must take note that it is to be understood universally with reference to the stipulations of fidejussors that whatever is stated in writing to have been done is considered to have been done, and therefore it is well established that if a man declare in writing that he has become fidejussor, all the solemnities are regarded as having been performed.

TIT. XXI. ON OBLIGATIONS BY WRITING.

In ancient times there was a kind of obligation described as being made by "entries," but these "entries" are not now in use². And yet if any one states in writing that he owes money, which has never really been paid over to him; he cannot, after a long time has elapsed, put in the plea of non-payment: for

¹ III. 26; Gaius III. 127.

² These are fully described in Gaius III. 128—133.

non potest: hoc enim saepissime constitutum est¹. Sic fit, ut et hodie, dum queri non potest, scriptura obligetur; et ex ea nascitur *condictio*, cessante scilicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat: sed ne creditores diutius possint suis pecuniis forsitan defraudari, per constitutionem nostram² tempus coartatum est, ut ultra biennii metas huiusmodi exceptio minime extendatur.

TIT. XXII. DE CONSENSU OBLIGATIONE.

Consensu fiunt obligationes in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis. (1.) Ideo autem istis modis consensu dicitur obligatio contrahi, quia neque scriptura neque praesentia omnimodo opus est³, ac ne dari quicquam necesse est, ut substantiam capiat obligatio;

this has been decided over and over again¹. So the result even now-a-days is that inasmuch as he cannot maintain a defence, he is bound by the writing, and thereupon is founded a *condictio*, provided, that is to say, there be no verbal obligation. The "long time" connected with this exception used formerly, by virtue of certain imperial constitutions, to extend to five years. But to prevent the possibility of creditors being defrauded of their money after the lapse of time, the period has been shortened by one of our own constitutions², so that this exception is not now applicable beyond the limit of two years.

TIT. XXII. ON OBLIGATIONS BY CONSENT.

Obligations arise from consent in the cases of buying and selling, letting and hiring, partnerships and mandates. 1. And the obligation is said to be contracted by consent in these cases, because neither writing nor a meeting of the parties³ is at all needful, nor is it required that anything should be given, in order that the obligation may become binding: but it is

¹ C. Hermog. 1; C. Theod. 2. 27; C. Just. 4. 30. 14.

² C. 4. 30. 14. pr.

³ This was essential in verbal obligations; III. 19. 12.

sed sufficit eos qui negotium gerunt consentire¹. (2.) unde inter absentes quoque talia negotia contrahuntur, veluti per epistolam aut per nuntium. (3.) Item in his contractibus alter alteri obligatur in id quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat².

TIT. XXIII. DE EMPTIONE ET VENDITIONE.

Emptio et venditio contrahitur simulatque de pretio convenit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. nam quod arrae nomine datur argumentum est emptionis et venditionis contractae³. Sed haec quidem de emptionibus et venditionibus quae sine scriptura consistunt obtinere oportet; nam nihil a nobis in huiusmodi venditionibus innovatum est. In his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus⁴,

enough that those who are transacting the business arrive at an agreement¹. 2. Therefore such contracts are made even between persons at a distance one from the other, for example, by letter or messenger. 3. Likewise, in these contracts each is bound to the other for all that the one ought in fairness and equity to do for the other, whilst, on the contrary, in verbal obligations one stipulates and the other promises².

TIT. XXIII. ON BUYING AND SELLING.

A contract of buying and selling is concluded so soon as agreement is made about the price, even though the price has not yet been paid, nor even earnest given. For what is given in earnest is only evidence of a contract of buying and selling having been entered into³. These rules, however, are to be applied to sales which are effected without writing; for as to such we have made no innovation. But as to those solemnized by writing we have ordained⁴ that no sale shall be perfect, unless an instrument of sale has been drawn up by the

¹ Gaius III. 136.

² The actions arising from verbal and literal obligations were as a rule *stricti juris*, those from real or consensual contracts *bonae fidei*. IV.

6. 28—30.

³ That is to say, it is not of the essence of the contract.

⁴ C. 4. 21. 17.

nisi et instrumenta emptionis fuerint conscripta¹, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta, et si per tabellionem fiant, nisi et completiones acceperint, et fuerint partibus absoluta. donec enim aliquid ex his deest, et poenitentiae locus est, et potest emptor vel venditor sine poena recedere ab emptione. ita tamen impune recedere eis concedimus, nisi iam arrarum nomine aliquid fuerit datum: hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum, si quidem emptor est, perdit quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est. (1.) Pretium autem constitui oportet: nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. alioquin, si ita inter aliquos convenerit, ut quanti Titius rem aestimaverit, tanti sit empti: inter veteres satis abundeque hoc dubitabatur, sive constat venditio, sive non. sed nostra decisio² ita hoc constituit, ut

two parties³, either in their own handwriting, or written by a third person, but at any rate signed by the contracting parties; and if drawn by a notary (it shall not be valid) unless completed and executed by the parties: for so long as any of these requirements is wanting, there is an opportunity for change of purpose, and either buyer or seller may retract without penalty. But we have allowed them to retract without penalty only when nothing has been already given by way of earnest: for if there has been something of the kind, then whether the sale has been made by writing or without writing, the party refusing to fulfil the contract, if he be the buyer, loses what he has given as earnest; and if he be the vendor, is compelled to return double, although no specific agreement as to the earnest may have been made. 1. Further, a price ought to be fixed, for there can be no sale without a price: and moreover it ought to be definite. If, on the contrary, an agreement be made between any two persons that the article shall be bought for that price at which Titius shall value it, there was doubt enough and to spare amongst the ancients on the point whether this sale stood good or not. But a decision of ours² has settled the matter thus; that whenever the sale is

¹ "By the two parties" seems to be the force of the preposition in *conscripta*.

² C. 4. 38. 15.

quotiens sic composita sit venditio, quanti ille aestimaverit, sub hac condicione stare contractus, ut si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretium persolvatur, et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto. quod ius cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere. (2.) Item pretium in numerata pecunia consistere debet¹. nam in ceteris rebus an pretium esse possit, veluti homo aut fundus aut toga alterius rei pretium esse possit, valde quaerebatur. Sabinus et Cassius etiam in alia re putant posse pretium consistere: unde illud est quod vulgo dicebatur per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis venditionisque vetustissimam esse; argumentoque utebantur Graeco poeta Homero qui aliqua parte exercitum

arranged "for such price as he shall assess," the contract shall stand good under the circumstances following, viz. that if he who is nominated shall fix the price, it shall be paid in all cases according to his estimate, and the article shall be delivered; so that the sale shall become effectual, the purchaser proceeding by *actio ex empto* and the vendor by *actio ex vendito*. But if the person nominated shall be either unwilling or unable to fix the price, then the sale shall be null and void, on the ground of no price being defined. And as this rule has been approved by us in reference to sales, it is not absurd to apply it also to lettings and hirings. 2. Likewise the price must consist of coin¹. For whether the price can consist of other things, for instance, whether a slave, or a garment or a piece of land can be the price of another thing used to be greatly disputed. Sabinus and Cassius think the price may consist of some other thing: and hence comes the vulgar notion that by the exchange of things a buying and selling is contracted, and that this species of buying and selling is the most ancient: and they used to quote as an authority the Greek

¹ Gaius III. 141.

Achivorum vinum sibi comparasse ait, permutatis quibusdam rebus, his verbis :

Ἐνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
 Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἰθωνι σιδήρῳ,
 Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσιν,
 Ἄλλοι δ' ἀνδραπόδεσσιν.

Diversae scholae auctores contra sentiebant, aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem. alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse? nam utramque videri et venisse et pretii nomine datam esse rationem non pati. Sed Proculi sententia dicentis permutationem propriam esse speciem contractus, a venditione separatam, merito praevaluit, cum et ipsa aliis Homericis versibus adiuvatur, et validioribus rationibus argumentatur. quod et anteriores divi Principes admiserunt, et in nostris digestis latius significatur¹. (3.) Cum autem emptio et venditio con-

poet Homer, who in a certain passage says that the army of the Achæans procured wine by giving other articles in exchange, his words being: "Thereupon, then, the long-haired Achæans obtained wine, some for brass, some for glittering steel, some for skins of cattle, some for cattle themselves, some for slaves." The authorities of the other school took a different view, and thought that exchange of things was one matter, buying and selling another: otherwise, they said, it could not be made clear when things were exchanged which thing was to be considered sold and which given as a price: for reason does not suffer that both should be considered sold and both given for the price. But the opinion of Proculus, who maintained that exchange was a distinct variety of contract and separate from sale, has with good reason prevailed; since it is both supported by other lines from Homer and defended by stronger reasoning. A fact which former emperors admitted, and which is stated more fully in our Digest¹. 3. Now when

¹ D. 18. 1. 1; D. 19. 4. 1. pr. The dispute is more important than appears at first sight. The old Roman law regarded exchange as a

real contract, so that a mere agreement to exchange would not be binding, and the exchange could only be enforced in case one of the

tracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur): periculum rei venditae statim ad emptorem pertinet, tamenetsi adhuc ea res emptori tradita non sit. itaque si homo mortuus sit, vel aliqua parte corporis laesus fuerit, aut aedes totae vel aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatu sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. quicquid enim sine dolo et culpa venditoris acciderit, in eo venditor securus est. sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet: nam et commodum eius esse debet cuius periculum est. Quodsi fugerit homo qui veniit, aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad tra-

the contract of buying and selling is complete (which we have already stated is so soon as agreement has been arrived at, in the case where the business is done without writing): the risk attaching to the article sold falls at once upon the purchaser, even though the article has not yet been transferred to him; and, therefore, if a slave die or suffer injury in any part of his body, or if a house be destroyed wholly or partly by fire, or if a field be wholly or partly carried away by the force of a stream, or be made considerably smaller or less valuable by an inundation, or by trees being thrown down by a tempest, the loss is the purchaser's, and he is obliged to pay the price, although he has not obtained the article. For the vendor is clear of responsibility for anything which happens without his fraud or negligence. So, again, if there be any accrual to the land by alluvion after the sale, this goes to the profit of the purchaser: for the benefit ought to belong to the same person as the risk. Yet if a slave who has been sold run away or be stolen under such circumstances that there is neither fraud nor negligence on the part of the vendor, we must look whether

parties had delivered the thing which he was to part with; but if the Sabinians could have been victorious in their argument that an

exchange was a sale, an exchange would have become a consensual contract, and a mere agreement to exchange would have been binding.

ditionem venditor suscepit. sane enim, si suscepit, ad ipsius periculum is casus pertinet; si non suscepit, securus erit. idem et in ceteris animalibus ceterisque rebus intellegimus. Utique tamen vindicationem rei et conditionem exhibere debet emptori: quia sane qui rem nondum emptori tradidit adhuc ipse dominus est. idem est etiam de furti et de damni iniuriæ actione¹. (4.) Emptio tam sub conditione quam pure contrahi potest. sub conditione, veluti si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot. (5.) Loca sacra vel religiosa, item publica (veluti forum, basilicam²) frustra quis sciens emit, quæ tamen si pro privatis vel profanis deceptus a venditore emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur quod sua interest deceptum eum non esse³. Idem iuris est, si hominem liberum pro servo emerit.

the vendor undertook the safe-keeping of him until delivery. For, undoubtedly, if he undertook this, the accident forms part of his risk: but if he did not undertake it, he will be clear of liability. The same we shall understand to apply to the case of other animals and other things. But at any rate the vendor is bound to assign to the purchaser his right of action, whether *in rem* or *in personam*: because, undoubtedly, he who has not yet delivered an article to the purchaser is still owner of it. The same is the rule as to the actions of theft and wrongful damage¹. 4. A sale may be made either absolutely or conditionally: conditionally, as for instance: "if Stichus be approved by you before a certain day he shall be purchased by you for so many *aurei*." 5. No one can validly purchase lands that are sacred, or religious, or public (as for instance a forum or portico²) with knowledge of their character: although if he buy them as private or non-sacred, being deceived by the vendor, he will have an *actio ex empto* on account of being unable to obtain them; so that he may recover what it would have been worth to him not to have been deceived³. And the rule is the same in case he has bought a free person on the supposition that he is a slave.

¹ The *actio furti* is for a penalty only; see IV. 1; and belongs to the owner equally with the *vindicatio* or *condictio furtiva* for recovery of the article itself or for payment of

its value.

² The *basilicæ* surrounded the forum.

³ The rule was different in the case of a stipulation; III. 19. 2.

TIT. XXIV. DE LOCATIONE ET CONDUCTIONE.

Locatio et conductio proxima est emptioni et venditioni, hisdemque iuris regulis consistunt. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit. Et competit locatori quidem locati actio, conductori vero conducti. (1.) Et quae supra diximus¹, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et conductione dicta esse intellegamus, si alieno arbitrio merces permissa fuerit. Qua de causa si fulloni polienda curandave, aut sarcinatori sarcienda vestimenta quis dederit, nulla statim mercede constituta, sed postea tantum daturus quantum inter eos convenerit, non proprie locatio et conductio contrahi intellegitur, sed eo nomine praescriptis verbis actio datur². (2.) Praeterea, sicut vulgo quaerebatur, an permutatis rebus emptio et

TIT. XXIV. ON LETTING AND HIRING.

Letting and hiring approximates to buying and selling, and is contracted according to the same rules of law. For as buying and selling is contracted when the parties have agreed upon a price, so also is letting and hiring considered to be contracted when the hire has been settled. And on behalf of the letter an *actio locati* can be brought, on behalf of the hirer an *actio conducti*. 1. Also the remarks which we made above¹ on the case where a price is left to the discretion of a third person we must understand to be applicable also to a letting and hiring in which the hire is left to another to decide. Therefore, if I give garments to a fuller to be smoothed and cleaned or to a tailor to be repaired, no hire being settled at the time, but my intention being to give afterwards what shall be agreed between us, it is held that no proper letting and hiring is contracted, but an action *praescriptis verbis* is granted on the facts². 2. Moreover, just as it used to be commonly debated

¹ III. 23. 1.

² Under the formulary system, when the letter of an enactment applied to a case, the Praetor granted an *actio directa*: when the case fell within the spirit of an

enactment, but not within its letter, the Praetor granted an *actio utilis*: when there was an obvious wrong, but no enactment applicable to its redress either directly or constructively, the Praetor still interfered in

venditio contrahitur, ita quaeri solebat de locatione et conductione, si forte rem aliquam tibi utendam sive fruendam quis dederit, et invicem a te aliam utendam sive fruendam acceperit. et placuit non esse locationem et conductionem, sed proprium genus esse contractus. veluti si cum unum quis bovem haberet et vicinus eius unum, placuerit inter eos, ut per denos dies invicem boves commodarent ut opus facerent, et apud alterum bos periit: neque locati vel conducti, neque commodati competit actio, quia non fuit gratuitum commodatum, verum praescriptis verbis agendum est.

3. Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quaeri soleat utrum emptio et venditio contrahatur, an locatio et conductio. Ut ecce de praediis quae perpetuo quibusdam fruenda traduntur, id est ut quamdiu pensio sive redditus pro his domino praestetur, neque ipsi con-

whether a buying and selling was effected by an exchange, so too was the question raised concerning a letting and hiring, whenever a person gave you an article to use or enjoy and in turn received from you something else to use or enjoy. And it has been decided that this is not a letting and hiring but a special variety of contract: as for example, supposing a certain person has one ox, and his neighbour one, and it be agreed between them for each to lend his ox to the other for ten days at a time to do his work, and then an ox dies whilst in the possession of the other party, no action of letting and hiring is available; nor any action on loan, because the loan was not gratuitous: but proceedings must be taken by an *actio praescriptis verbis*.

3. Buying and selling and letting and hiring have so close a resemblance one to the other, that in some cases it is a question whether a buying and selling is contracted, or a letting and hiring. As is the case, for instance, with lands which are delivered to persons for perpetual enjoyment, i.e. that so long as the rent or render is paid for them to the owner they may not be taken away either from the hirer or

his capacity of supreme administrator of equity, and issued a *formula* describing the facts alleged, *prae-*

scriptis verbis, and stating the remedy which was to follow upon their proof.

ductori neque heredi eius cuive conductor heresve eius id praedium vendiderit aut donaverit aut dotis nomine dederit aliove quo modo alienaverit, auferre liceat. sed talis contractus, quia inter veteres dubitabatur, et a quibusdam locatio, a quibusdam venditio existimabatur: lex Zenoniana¹ lata est quae emphyteuseos contractui propriam statuit naturam, neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita obtinere, acsi naturalis esset contractus; sin autem nihil de periculo rei fuerit pactum, tunc si quidem totius rei interitus accesserit, ad dominum super hoc redundare periculum, sin particularis, ad emphyteuticarium huiusmodi damnum venire. quo iure utimur.

4. Item quaeritur, si cum aurifice Titius convenerit, ut is ex auro suo certi ponderis certaeque formae anulos ei faceret, et acceperit verbi gratia aureos decem, utrum emptio et venditio contrahi videatur, an locatio et conductio². Cassius ait materiae quidem emptionem et venditionem contrahi,

his heir, or from any person to whom the hirer or his heir shall sell them, or give them, or assign them for a marriage-portion, or alienate them in any other manner. Seeing then that a contract of this description was a matter of doubt amongst the ancients, and regarded by some of them as a letting and by others as a sale, a law was enacted by Zeno¹ which settled the peculiar character of the contract of *emphyteusis*, as identical neither with letting nor sale, but to be maintained according to its special covenants. And so if any agreement be made, it is to be upheld as though it were of the essence of the contract: but supposing no agreement be made as to the risk, then if a total destruction of the subject take place, the loss arising therefrom shall fall upon the owner: but if a partial destruction, loss of such kind shall affect the occupier. And this rule we adopt.

4. Again, supposing Titius has agreed with a goldsmith to make rings for him of his own gold of a certain weight and certain form, and receive, say, ten *aurei*, it is a questionable matter whether the transaction should be considered as a buying and selling or a letting and hiring². Cassius says

¹ C. 4. 66. 1.

² Gaius III. 147.

operae autem locationem et conductionem. sed placuit tantum emptionem et venditionem contrahi. quodsi suum aurum Titius dederit, mercede pro opera constituta, dubium non est quin locatio et conductio sit.

5. Conductor omnia secundum legem conductionis facere debet, et si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare¹. Qui pro usu aut vestimentorum, aut argenti, aut iumentis, mercedem aut dedit aut promisit, ab eo custodia talis desideratur qualem diligentissimus paterfamilias suis rebus adhibet². quam si praestiterit et aliquo casu rem amiserit, de restituenda ea non tenebitur.

6. Mortuo conductore intra tempora conductionis, heres eius eodem iure in conductionem succedit³.

TIT. XXV. DE SOCIETATE.

Societatem coire solemus aut totorum bonorum, quam Graeci specialiter *κοινοπραξίαν* appellant; aut unius alicuius

there is a contract of buying and selling as to the material, but one of letting and hiring as to the workmanship. But it has been settled that there is a contract of buying and selling only. Yet if Titius give his own gold and a hire be agreed upon for the working, there is no doubt that this is a letting and hiring.

5. The hirer ought to do everything according to the terms of his hiring; and if anything has been omitted from the terms, he ought to supply it according to fairness and equity¹. When a man has given or promised a hire for the use of garments, or silver, or a beast of burden, such custody is required of him as the most careful master of a household would exercise over his own property²: and if he maintain this and yet lose the article by some accident, he will not be under liability to make good its loss.

6. When the hirer dies within the time of the hiring, his heir succeeds to the hiring on the original terms³.

TIT. XXV. ON PARTNERSHIP.

We are in the habit of entering into a partnership either as to all our property, which the Greeks call by the special name

¹ D. 19. 2. 25. 3.

² D. 19. 2. 25. 7.

³ C. 4. 65. 10.

negotiationis, veluti mancipiorum emendorum vendendorum-que, aut olei, vini, frumenti emendi vendendique. (1.) Et quidem, si nihil de partibus lucri et damni nominatim convenerit, aequales scilicet partes et in lucro et in damno spectantur. Quodsi expressae fuerint partes, hae servari debent: nec enim umquam dubium fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem duae partes et damni et lucri pertineant, ad alium tertia. (2.) De illa sane conventionem quaesitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri duae partes pertineant, damni tertia, ad Seium duae partes damni, lucri tertia, an rata debeat haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit¹, et ob id non esse ratam habendam. Servius Sulpicius cuius sententia praevaluit contra sentit, quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam

of *κοινωνία*; or as to one particular branch of trade, as for instance, the buying and selling of slaves or of oil, wine or corn. 1. And if no special agreement be made about the shares of gain and loss, equal shares as to both are presumed. But if the parts be specified, they are to be observed: for it has never been doubted that an agreement is binding wherein two people have arranged that two-thirds, for instance, of the loss and gain shall belong to one, and the other third to the other. 2. But there has been a dispute whether such an agreement as the following should be considered binding, viz. where Titius and Seius have bargained one with the other, that two-thirds of the gain shall belong to Titius and one-third of the loss; and to Seius two-thirds of the loss and one-third of the gain. Quintus Mucius held that such an agreement was contrary to the very nature of partnership¹, and therefore ought not to be held valid. Servius Sulpicius, whose opinion has prevailed, thinks the contrary, because frequently the services of some of the parties are so valuable in a partnership that it is fair they should be admitted thereto on favourable terms: for it is indisputable that a partnership may be made on the condition that one of the parties shall contribute money

¹ "Societas jus quodammodo fraternitatis in se habet." D. 17. 2. 63. pr.

conferat, alter non conferat, et tamen lucrum inter eos commune sit, quia saepe opera alicuius pro pecunia valet¹. et adeo contra Quinti Mucii sententiam obtinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, damno non teneatur², quod et ipsum Servius convenienter sibi existimavit: quod tamen ita intellegi oportet, ut si in aliqua re lucrum in aliqua damnum allatum sit, compensatione facta, solum quod superest intellegatur lucri esse. (3.) illud expeditum est, si in una causa pars fuerit expressa, veluti in solo lucro vel in solo damno, in altera vero omissa: in eo quoque quod praetermissum est eandem partem servari³.

4. Manet autem societas eousque, donec in eodem consensu perseveraverint; at cum aliquis renuntiaverit societati, solvitur societas. sed plane si quis callide in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti

and the other not contribute, and yet the gain be shared between them; for frequently the services of one are as valuable as money¹. And the law has been settled in a manner so contrary to the opinion of Quintus Mucius, that it is even allowed that an agreement may be made for one to take a portion of the gain and yet not be responsible for the loss²; a rule which Servius maintained consistently with himself: but this is to be understood in the sense that if gain occur in one matter and loss in another, the balance alone, after a set-off has been made, is to be considered gain. 3. It is well-established that if the share be specified in one case only, for instance as to the gain alone or as to the loss alone, and not specified in the other, the same share must be understood in the one omitted³.

4. A partnership continues so long as the partners remain in the same mind: but when any one of them has renounced the partnership, the partnership is dissolved. Yet, undoubtedly, if a man craftily renounce a partnership with the intent of solely enjoying some anticipated gain; for instance,

¹ See Cic. *pro Rosc. Com.* 10.

² Justinian follows Gaius in attributing to Q. Mucius the doctrine here condemned. But the passage in D. 17. 2. 30 (which is the only one on the subject) does not assert

that Mucius held this view, but merely that Sulpicius said that Mucius would have been wrong in case he had held it. See our note on Gaius III. 149.

³ Gaius III. 150.

si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaceret, cogetur hoc lucrum communicare. si quid vero aliud lucrifaciat quod non captaverit, ad ipsum solum pertinet. ei vero cui renuntiatum est, quicquid omnino post renuntiatam societatem acquiritur, soli conceditur¹. (5.) Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit certam personam sibi elegit. sed et si consensu plurium societas coita sit, morte unius solvitur, etsi plures supersint, nisi in coeunda societate aliter convenerit². (6.) Item si alicuius rei contracta societas sit, et finis negotio impositus est, finitur societas. (7.) Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur: nam, cum in eius locum alius succedat, pro mortuo habetur. (8.) Item si quis ex sociis mole debiti praegravatus bonis suis cesserit, et ideo propter publica aut privata debita substantia eius veneat,

if a partner in all property, when left heir by some one, renounce the partnership with the view of solely having the benefit of the inheritance, he will be compelled to share this gain. If, on the other hand, he chance upon some gain which he did not aim at obtaining this belongs to him alone. But whatever is acquired from any source after the renunciation of the partnership is granted to that partner alone to whom the renunciation was addressed¹. 5. Further, a partnership is dissolved by the death of a partner, because he who makes a contract of partnership selects for himself a definite person. And even when a partnership is formed by the consent of a number of persons, it is dissolved by the death of any one partner, although several survive, unless there was an agreement to the contrary at the time of formation². 6. Likewise, if a partnership be formed for a special object, and the object be accomplished, the partnership is ended. 7. It is clear that a partnership is also brought to an end by a confiscation, that is to say, if the whole of the goods of one partner be confiscated: for when another person succeeds to his position, he is considered as dead. 8. So too if any one of the partners, weighed down with the burden of his debts, make an assignment of his goods, and thereupon his property be sold to

¹ Gaius III. 151.

² Gaius III. 152.

solvitur societas. sed hoc casu si adhuc consentiant in societatem, nova videtur incipere societas¹.

9. Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is qui deponi apud se passus est, an etiam culpa, id est desidia² atque negligentiae nomine, quaesitum est: praevaluit tamen etiam culpa nomine teneri eum. culpa autem non ad exactissimam diligentiam dirigenda est: sufficit enim talem diligentiam in communibus rebus adhibere socium qualem suis rebus adhibere solet. nam qui parum diligentem socium sibi assumpsit, de se queri debet².

TIT. XXVI. DE MANDATO.

Mandatum contrahitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. at si tua tantum gratia

satisfy his debts public or private, the partnership is ended: but in this case, if the parties still agree to be partners, a new partnership is considered to arise¹.

9. Whether one partner is liable to another in an action *pro socio* for actual fraud only, in analogy to the rule applicable to a voluntary depositary, or whether he is liable for *culpa* as well, that is for inattention and negligence, has been much debated; however the liability for *culpa* also has now been fully recognized. But *culpa* is not to be measured by the most exact diligence: for it is enough that a partner apply to the common business the same care which he is accustomed to apply to his own affairs: since one who takes to himself a negligent partner ought to blame himself².

TIT. XXVI. ON MANDATE.

A mandate is contracted in five ways; viz. if a man give one for his own benefit alone, or for his own and yours, or for a third party's only, or for his own and a third party's or for yours and a third party's: but if the mandate be given you for your

¹ Gaius III. 153, 154.

² See App. M. on liability for

damage arising through accident, carelessness, or design.

tibi mandatum sit, supervacuum est mandatum, et ob id nulla ex eo obligatio nec mandati inter vos actio nascitur¹. (1.) Mandantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia eius gereres, vel ut fundum ei emereres, vel ut pro eo sponderes. (2.) Tua et mandantis, veluti si mandet tibi, ut pecuniam sub usuris crederes ei qui in rem ipsius mutuaretur, aut si, volente te agere cum eo ex fideiussoria causa, mandet tibi, ut cum reo agas periculo mandantis², vel ut ipsius periculo stipuleris ab eo quem tibi deleget in id quod tibi debuerat³. (3.) Aliena autem causa intervenit mandatum, veluti si tibi mandet, ut Titii negotia gereres, vel ut Titio fundum emereres, vel ut pro Titio sponderes. (4.) Sua

benefit only, it is void, and no obligation or action of mandate results therefrom between you¹. 1. A mandate is for the benefit of the mandator alone in the instance where a person commissions you to transact his business, or to buy a field for him, or to become surety for him. 2. A mandate is for your benefit and that of the mandator in the instance where he commissions you to lend money on interest to a person who is borrowing it for his purposes: or when you are intending to sue him by reason of his being a surety, and he commissions you to sue the principal at his (the mandator's) risk²; or when he commissions you to stipulate at his risk that something which he owes to you shall be paid by a person whom he assigns to you as his substitute³. 3. A mandate is for the benefit of a third party in the instance when he commissions you to manage the business of Titius, or to buy a field for Titius, or to become surety for Titius. 4. A mandate is for the giver's own benefit and that of a third party in the instance

¹ This is an excerpt from Gaius' *Liber Rerum Quotidianarum sive Aureorum*, and is borrowed from D. 17. 1. 2. pr. It will be observed that the sixth variety of mandate is omitted, viz. that for the benefit of the *mandator*, the *mandatarius* and a third party.

² It was by this method that a *fidejussor* availed himself of the *Rescriptum Hadrianum*, mentioned in III. 20. 4.

³ The benefit of the *mandator* is obvious in this case. That of the *mandatarius* consisted in the fact that he not only got a new claim instead of the old one (so far remaining in *statu quo*), but also in case of non-payment by the *delegatus* could return upon the mandator by an *actio mandati*. Thus he had two chances of payment instead of one. So also in the second of the three examples.

et aliena, veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et Titio fundum emerēs, vel ut pro eo et Titio sponderes. (5.) Tua et aliena, veluti si tibi mandet, ut Titio sub usuris crederes. quodsi sine usuris crederes, aliena tantum gratia intercedit mandatum. (6.) Tua gratia intervenit mandatum, veluti si tibi ~~mandet~~, ut pecunias tuas potius in emptiones praediorum colloques ~~quam~~ feneres, vel ex diverso, ut feneres potius quam in emptiones ~~praedio-~~rum colloques. Cuius generis mandatum magis consilium est quam mandatum, et ob id non est obligatorium: quia nemo ex consilio mandati obligatur, etiamsi non expediat ei cui dabitur, cum liberum cuique sit apud se explorare, an expediat consilium¹. itaque si otiosam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emerēs vel eam crederes, quamvis non expediat tibi eam emisse vel credidisse, non tamen tibi mandati tenetur. et adeo haec ita sunt, ut quaesi-

where he commissions you to manage business common to himself and Titius, or to buy a field for him and Titius, or to become surety for him and Titius. 5. A mandate is for your benefit and a third party's in the instance where he commissions you to lend money on interest to Titius: but if the direction be that you shall lend money without interest, the mandate is for the benefit of the third party alone. 6. A mandate is for your sole benefit in the instance where he commissions you to invest your money in the purchase of land rather than in loans at interest: or conversely to invest it at interest rather than in the purchase of land. Which description of mandate is rather advice than a mandate, and therefore creates no obligation: because no one is bound for mandate on account of the advice he gives, even though it be not advantageous to the person to whom it is given, inasmuch as any man is at liberty to judge for himself whether the advice is profitable¹. Therefore, if you have money lying idle at home, and some one exhort you to purchase a particular article or to lend the money, he is not liable to you for mandate, although it may not prove to your advantage to have bought or lent. And these rules are so universally true, that it has been questioned whether a man is liable for mandate when he has commissioned you to

¹ Gaius III. 156.

tum sit, an mandati teneatur qui mandavit tibi, ut Titio pecuniam fenerares: sed obtinuit Sabini sententia obligatorium esse in hoc casu mandatum, quia non aliter Titio credidisses, quam si tibi mandatum esset¹.

7. Illud quoque mandatum non est obligatorium quod contra bonos mores est, veluti si Titius de furto aut de damno faciendo aut de iniuria facienda tibi mandet. licet enim poenam istius facti nomine praestiteris, non tamen ullam habes adversus Titium actionem².

8. Is qui exequitur mandatum non debet excedere fines mandati. ut ecce si quis usque ad centum aureos mandaverit tibi, ut fundum emeris, vel ut pro Titio sponderes, neque pluris emere debes, neque in ampliorem pecuniam fideiubere: alioquin non habebis cum eo mandati actionem. adeo quidem, ut Sabino et Cassio placuerit, etiamsi usque ad centum aureos cum eo agere velis, inutiliter te acturum; diversae scholae auctores recte usque ad centum aureos acturum ex-

lend money on interest to Titius; but the opinion of Sabinus has prevailed, that the mandate in such cases creates an obligation, because you would not have lent to Titius unless the mandate had been given to you¹.

7. Another mandate which creates no obligation is one contrary to morality, as when Titius commissions you to commit a theft, or a damage or an injury. For although you may incur a penalty for such an act, yet have you no right of action against Titius².

8. He who executes a mandate ought not to exceed its terms. For instance, if any one commissions you to buy land or to become surety for Titius up to the amount of one hundred *aurei*, you must neither buy at a higher price nor become surety for a larger sum; otherwise you will have no action of mandate against him; so that according to the opinion of Sabinus and Cassius you would sue in vain, even if you desired to proceed against him for a hundred *aurei* only. The authors of the other school consider that you may rightly sue up to the amount of one hundred *aurei*; and this opinion

¹ It is not the mention of a third party which makes a mandate binding, but the mention of him in such a manner as to induce the man-

datarius to do what he would not otherwise have done. D. 17. 1. 6. 5.

² Gaius III. 157.

infirmitas: quae sententia sane benignior est¹. Quodsi minores empta, tabulis solvet cum eo actionem. mandatum qui mandavit, et tibi contra auctorem facere emerent, is utique mandatum intelligitur, et minora, si possit, emerent.

9. Rursum quomodo mandatum contrahitur, si cum adhuc integri res sit revocatum fuerit, evanescit. (10.) Item si adhuc integro mandato mors alterutrius interveniat, nil est vel eius qui mandaverit, vel illius qui mandatum suscepit, solvere mandatum. sed utilitatis causa receptum est, ut si mortuo eo qui tibi mandaverat, tu ignorans eum decessisse extortus fuerit mandatum, posse te agere mandati actione: alioquin iusta et probabilis ignorantia damnum tibi afferet. et tunc simile est quod placuit, si debitores manumisso dispensatore Titii per ignorantiam liberto solverint, liberari eos: cum alioquin stricta iuris ratione non possent liberari, quia alii solverant quam cui solvere debuerint².

undoubtedly is the more equitable¹. But if you buy for a smaller sum you will certainly have an action of mandate against him: because when a person gives a mandate for a field to be bought for him at a hundred *aurei*, it is considered obvious that he gives the mandate for its purchase at a lower price, if possible.

9. Again, a mandate duly contracted, if revoked before the subject has been dealt with, becomes void. 10. Likewise, if the death of either of the parties occur before the execution of the mandate is commenced, that is either of him who gave the mandate, or of him who undertook it, the mandate is made null. But for convenience the rule has been adopted, that if after the death of your mandator, you, being ignorant that he is dead, carry out the mandate, you can bring an action of mandate: otherwise a justifiable and reasonable ignorance would bring loss upon you. Similar to this is the rule commonly upheld, that if debtors, after the steward of Titius has been manumitted, make payment to him by mistake when he is a freedman, they are freed; although, on the other hand, by strict rule of law they could not be freed, because they have paid a person other than the one whom they ought to have paid².

¹ Although Gaius quotes the opinion of Sabinus and Cassius in his Commentaries (III. 161), yet he himself advocates the other view in

D. 17. 1. 4. So also does Julianus in D. 17. 1. 33.

² This paragraph is quoted almost verbatim from Gaius III. 160. See

11. *Mandatum non suscipere cuilibet liberum est : susceptum autem consummandum aut quamprimum renuntiandum est, ut per semetipsum aut per alium eandem rem mandator exequatur. nam nisi ita renuntiatur, ut integra causa mandatori reservetur eandem rem explicandi, nihilominus mandati actio locum habet, nisi iusta causa intercessit aut non renuntiandi aut intempestive renuntiandi.*

12. *Mandatum et in diem differri, et sub condicione fieri potest.*

13. *In summa sciendum est mandatum, nisi gratuitum sit, in aliam formam negotii cadere : nam mercede constituta incipit locatio et conductio esse. et ut generaliter dixerimus : quibus casibus sine mercede suscepto officio mandati aut depositi contrahitur negotium, his casibus interveniente mercede locatio et conductio contrahi intellegitur. et ideo si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda, nulla mercede constituta neque promissa, mandati competit actio¹.*

11. It is allowable for any person to decline a mandate : but when accepted it ought to be carried out, or renounced with all speed, so that the mandator may execute the business personally or by means of another person. For except it be renounced in such manner that full power is left to the mandator to carry out the same matter, an action of mandate is still admissible, unless some reasonable cause existed for not renouncing or for renouncing at an inconvenient time.

12. A mandate may have its execution postponed to a future date or be made under condition.

13. Lastly, we must observe that unless a mandate be gratuitous it falls under some other class of contract : for if a hire be fixed it is at once a letting and hiring. And, as a general definition, in what cases soever the matter contracted is a mandate or deposit, if the duty be undertaken without reward, in those same cases there is understood to be a contract of letting and hiring, if a reward is given. And, therefore, if you give garments to a fuller to be smoothed or cleaned, or to a tailor to be repaired, no hire being settled or promised, an action of mandate lies¹.

our notes on that passage.

¹ Gaius III. 162. By the action

of mandate expenses could be recovered and compensation obtained

TIT. XXVII. DE OBLIGATIONIBUS QUASI EX CONTRACTU.

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur. (1.) Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum: sed domino quidem rei gestae adversus eum qui gessit directa competit actio; negotiorum autem gestori contraria. quas ex nullo contractu proprie nasci manifestum est: quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se obtulerit; ex qua causa hi quorum negotia gesta fuerint etiam ignorantes obligantur. idque utilitatis causa receptum est, ne absentium qui ~~subita festinatione~~ *subita festinatione* coacti, nulli ~~demandata negotiorum~~ *demandata negotiorum* suorum administratione, peregre pro-

TIT. XXVII. ON OBLIGATIONS QUASI EX CONTRACTU.

Now, having enumerated the varieties of contracts, let us look at those obligations which are not considered to arise properly from contract, but yet, as they do not originate from delict, are regarded as arising "as it were from a contract." 1. Whenever, then, any person transacts the business of another in his absence, rights of action reciprocally spring up between them, which are styled *negotiorum gestorum*: but on behalf of the owner of the matter dealt with as against the person who has done the business there is a "direct" action; on behalf of the doer of the business there is a "contrary" action. That these do not arise properly from any contract is clear: since such actions are brought when a man has interfered with another's business without a mandate: and therefore the persons whose business has been transacted are under an obligation even without their knowledge. And this rule has been adopted for the public advantage, in order that when men go abroad in consequence of sudden emergency, without entrusting the management of their affairs to any one,

for loss of time, and as these were reckoned *ex bona fide* the work-

man received after all a fair recompense.

fecti essent, desererentur negotia : quae sane nemo curaturus esset, si de eo quod quis impendisset nullam habiturus esset actionem. sicut autem is qui utiliter gesserit negotia habet obligatum dominum negotiorum, ita et contra iste quoque tenetur, ut administrationis rationem reddat. quo casu ad exactissimam quisque diligentiam compellitur reddere rationem : nec sufficit talem diligentiam adhibuisse qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia. (2.) Tutores quoque qui tutelae iudicio tenentur non proprie ex contractu obligati intelleguntur, nullum enim negotium inter tutorem et pupillum contrahitur : ~~sed quia~~ sane non ex maleficio tenentur, quasi ex contractu teneri videntur. ~~et hoc~~ autem casu mutuae sunt actiones : non tantum enim pupillus cum ~~tutore~~ ~~habet~~ tutelae actionem ; sed et ex contrario tutor cum pupillo habet ~~contrarium~~ ~~tutelae~~, si vel impenderit aliquid in rem pupilli, vel pro eo fuerit obligatus, aut rem suam creditori eius obligaverit. (3.) Item si inter aliquos communis sit res sine societate, veluti quod

their business may not be neglected in their absence : for no one surely would attend to it if he were to have no action for the recovery of the expenses he has incurred. But just as the man who has profitably conducted another's business, puts the owner under an obligation, so, on the other hand, is he on his part liable to render an account of his management. And under such circumstances he is bound to render his account according to a standard of the most perfect diligence : neither is it enough for him to have used the same amount of care which he usually employs in his own affairs, supposing another person more careful could have managed matters better. 2. Tutors, again, who are liable to an action for their administration, cannot properly be considered as bound by a contract, for there is no matter of contract between a tutor and a pupil : but as they are clearly not liable by reason of delict, they are considered bound "as if upon a contract." And in this case too there are reciprocal actions ; for not only has the pupil an action of tutorship against the tutor, but, on the other hand, the tutor has a "contrary" action of tutorship against the pupil, if he has spent anything for the pupil's benefit, or become bound on his behalf, or pledged his own property to the pupil's creditor. 3. Again, if in the absence of partner-

pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo iudicio, quod solus fructus ex ea re perceperit, aut quod socius eius in eam rem necessarias¹ impensas fecerit: non intellegitur proprie ex contractu obligatus esse (quippe nihil inter se contraxerunt); sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur. (4.) Idem iuris est de eo qui coheredi suo familiae erciscundae iudicio ex his causis obligatus est². (5.) Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur (neque

ship any property be common to several persons, for instance, by its being bequeathed or given to them jointly, and if therefore one of them be liable to the other in an action *communi dividundo*, on the ground that he alone has gathered the fruits of the same, or that his partner alone has incurred necessary¹ expenses upon it, he is not regarded as properly bound by contract (since in fact no agreement has been made between the parties): but as he is not liable by reason of delict, he is considered bound "as if upon a contract." 4. The rule is the same regarding one who is liable to his co-heir under like circumstances by means of an action *familiae erciscundae*². 5. The heir, again, is not strictly liable upon contract for the payment of legacies (for it cannot properly be said that the

¹ Expenses are divided by Ulpian into three varieties, (1) "necessary," i.e. such that the property would deteriorate if they were not incurred; (2) "profitable," *utiles*, which improve the property, although there would be no positive loss if they were not incurred; (3) "ornamental," *voluptuosae*, which in no way add to the value of the property nor save it from depreciation. See Ulpian's *Rules*, VI. 14—17. The expressions scattered through the title in the Digest "de communi dividundo," state so generally that expenses (without specification) could be recovered, that we may safely conclude that *utiles* as well as *necessariae* were brought into account. The fact that the reckoning was *ex bonâ fide* would lead us to the same conclusion, and further indicates that *voluptuosae* could not be reclaimed.

² The actions *communi dividundo* and *familiae erciscundae*, and a third not referred to in the text, viz. *finium regundorum*, are styled "mixt," as being partly real and partly personal in character. They are real inasmuch as their object is the assignment of a portion of a specific property, personal inasmuch as they further tend to repayment of damage caused by illegal detention and compensation for any advantage which one joint proprietor has obtained over the other in respect of the property. See IV. 6. 20. These actions are also sometimes spoken of as "divisory," sometimes as "duplex"; having the last appellation because the parties cannot be exactly discriminated as plaintiff or defendant, but each in some sense partakes of both characters. See App. O.

enim cum herede, neque cum defuncto ullum negotium legatarius gessisse proprie dici potest): et tamen, quia ex maleficio non est obligatus heres, quasi ex contractu debere intelligitur. (6.) Item is cui quis per errorem non debitum solvit quasi ex contractu debere videtur. adeo enim non intellegitur proprie ex contractu obligatus, ut si certiore rationem sequamur, magis (ut supra diximus)¹ ex distractu quam ex contractu possit dici obligatus esse; nam qui solvendi animo pecuniam dat in hoc dare videtur, ut distrahat potius negotium quam contrahat. sed tamen perinde is qui accepit obligatur, acsi mutuum illi daretur, et ideo *condictione*² tenetur. (7.) Ex quibusdam tamen causis repeti non potest quod per errorem non debitum solutum sit. namque definierunt veteres, ex quibus causis infitiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia³, item ex

legatee has transacted any business either with the heir or with the deceased person): and yet as the heir is not liable by reason of delict, he is considered bound "as if upon a contract." 6. Again, any person to whom another by mistake pays what is not due is considered bound "as if upon a contract." For so clearly is he not to be regarded as properly bound by contract, that if we follow out the true reason he may be said (as we have remarked above)¹ to be under obligation through the ending rather than through the beginning of a contract; for he who gives money with the intent of paying seems rather to give that he may dissolve a contract than that he may commence one. And yet the receiver is under the same obligation as if a loan had been made to him, and therefore is answerable in a *condiction*². 7. In some cases, however, there is no recovery of a payment made by mistake when not due. For the ancients laid down a rule, that in all cases where the amount recoverable is increased by the denial of liability there can be no recovery of a payment made without being due; as, for instance, in suits upon the Lex Aquilia³, or in suits for a

¹ III. 14. 1.

² "Actions *in personam*, wherein we assert that our opponent ought to give us something, or that

something ought to be done by him, are called *conditions*." Gaius IV. 5.

³ IV. 3.

legato¹. quod veteres quidem in his legatis locum habere voluerunt, quae certa constituta, per damnationem² cuiusque fuerant legata : nostra autem constitutio³, cum unam naturam omnibus legatis et fideicommissis indulsit, huiusmodi augmentum in omnibus legatis et fideicommissis extendi voluit ; sed non omnibus legatariis prae-buit, sed tantummodo in his legatis et fideicommissis, quae sacrosanctis ecclesiis ceterisque venerabilibus locis quae religionis vel pietatis intuitu honorificantur derelicta sunt, quae si indebita solvantur, non repetuntur.

TIT. XXVIII. PER QUAS PERSONAS NOBIS OBLIGATIO ACQUIRITUR.

Expositis generibus obligationum quae ex contractu vel quasi ex contractu nascuntur, admonendi sumus acquiri vobis non solum per vosmetipsos, sed etiam per eas personas quae in vestra potestate sunt, veluti per servos vestros et filios⁴ ; ut

legacy¹. The ancients intended this rule only to apply to legacies which consisted of a fixed amount and which were left to a person *per damnationem*² : but a constitution of our own³, which has made all legacies and trusts to be of one character, has also extended to all of them this augmentation : not however for the benefit of all legatees, but only with reference to those legacies and trusts which are bequeathed to holy churches and other hallowed places held in honour through a regard for religion and piety. And these if paid when not due cannot be recovered.

TIT. XXVIII. THROUGH WHAT PERSONS AN OBLIGATION CAN BE ACQUIRED FOR OUR BENEFIT.

After this explanation of the varieties of obligations originating from contract or from quasi-contract, we have next to notice that acquisition can be made for your benefit not only through yourselves, but also through those persons who are under your *potestas* ; for instance, through your slaves and children⁴ : but

¹ In all these cases the liability was doubled by denial. Gaius IV. 9, 171 ; Paulus, S. R. I. 19. 1.

² Gaius II. 282.

³ This constitution is not extant ;

but it would seem to have been an extension of the S. C. Neronianum ; Gaius II. 197.

⁴ Gaius III. 163.

tamen quod per servos quidem vobis acquiritur, totum vestrum fiat, quod autem per liberos quos in potestate habetis ex obligatione fuerit acquisitum, hoc dividatur secundum imaginem rerum proprietatis et ususfructus quam nostra discrevit constitutio¹; ut quod ab actione quoquomodo perveniat, huius usumfructum quidem habeat pater, proprietas autem filio servetur, scilicet patre actionem movente secundum novellae nostrae constitutionis divisionem². (1.) Item per liberos homines et alienos servos quos bona fide possidetis acquiritur vobis, sed tantum ex duabus causis, id est si quid ex operibus suis vel ex re vestra acquirant³. (2.) Per eum quoque servum in quo usumfructum vel usum habetis similiter ex duabus istis causis vobis acquiritur⁴.

3. Communem servum pro dominica parte dominis acquirere certum est, excepto eo, quod uni nominatim stipulando

with this difference, that any acquisition made through your slaves is wholly yours, whilst an acquisition in virtue of an obligation created by the instrumentality of your children whom you have under your *potestas* is divided, on the principle of ownership and usufruct of property laid down by our constitution¹: so that when anything is obtained in any manner through an action, the father has the usufruct thereof and the ownership is preserved for the son; provided only that the father brings the action according to the provisions of our new constitution².

1. Acquisition is also made for us by means of free men and the slaves of other people whom we possess in good faith; but only in two cases, viz. if they acquire anything by their own labour, or by means of our substance³. 2. Acquisition is also in like manner made for us in these two cases by means of a slave in whom we have the usufruct or use⁴.

3. A slave held in common undoubtedly acquires for his owners according to their shares of ownership, with the ex-

¹ C. 6. 61. 6 and 8. See also above, II. 9. 1.

² I.e. with the son's consent; C. 6. 61. 8. 3; unless the son be too young to be able to give it. If the son be able to give consent and yet withhold it, the father obtains both usufruct and ownership when suc-

cessful in the action. If the father refuse to bring the action, the son himself is allowed to bring it, and becomes full owner of what he recovers. C. 6. 61. 8. pr. and 2.

³ Gaius III. 164.

⁴ Gaius III. 165.

aut per traditionem accipiendo illi soli acquirit, veluti cum ita stipuletur: Titio domino meo dare spondes? sed si unius domini iussu servus fuerit stipulatus, licet antea dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantum acquirat qui hoc ei facere iussit, ut supra dictum est¹.

TIT. XXIX. QUIBUS MODIS OBLIGATIO TOLLITUR.

Tollitur autem omnis obligatio solutione eius quod debetur; vel si quis consentiente creditore aliud pro alio solverit². nec tamen interest, quis solvat, utrum ipse qui debet, an alius pro eo: liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat. item si reus solverit, etiam hi qui pro eo intervenerunt liberantur. idem ex con-

ception that by stipulating or receiving by delivery expressly for one he makes acquisition for that one only; for instance, when he stipulates thus: Do you engage to give to my master Titius? And further, if the slave have stipulated by the order of one of his masters, although in former times there was a doubt on the point, yet after a decision published by ourselves it was settled that he acquires only for the one who ordered him to do the act, as above stated¹.

TIT. XXIX. IN WHAT WAYS AN OBLIGATION IS DISSOLVED.

Every obligation is dissolved by the payment of what is due: or when a person with consent of the creditor pays one thing instead of another². Nor does it matter who pays, whether the actual debtor or another on his behalf: for he is set free even by another's payment, whether that payment take place with the knowledge of the debtor or without his knowledge or against his will. So, too, if the principal make payment, those who have become sureties for him are also

¹ III. 17. 3. Gaius III. 167.

² This had not been uncontroverted in early times; the Proculians at any rate maintained that the liberation was only *ope exceptionis*, and not *ipso jure*; in other

words, that there was no legal bar to the creditor's bringing an action, although when he brought it he would be defeated by the equitable answer which the Praetor allowed the debtor to put in. See Gaius III. 168.

trario contingit, si fideiussor solverit : non enim solus ipse liberatur, sed etiam reus.

1. Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur haec verba debitorem dicere: quod ego tibi promisi, habesne acceptum? et Titius respondeat: habeo. sed et Graece potest acceptum fieri, dummodo sic fiat ut Latinis verbis solet: ἔχεις λαβὼν δηνάρια τόσα; Ἐχω λαβὼν. Quo genere, ut diximus, tantum hae obligationes solvuntur quae ex verbis consistunt, non etiam ceterae¹: consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi². sed et id quod ex alia causa debetur potest in stipulationem deduci et per acceptilationem dissolvi. Sicut autem quod debetur pro parte recte solvitur, ita in partem debiti acceptilatio fieri potest. (2.) Est proliberated. And the same is the case in the contrary event of the surety paying: for not only is he personally liberated, but the debtor is also.

1. An obligation is also dissolved by *acceptilation*. And acceptilation is a fictitious payment. For if Titius wish to remit what is owed to him on a verbal obligation, this can be done by his allowing the debtor to say the following words: "Do you acknowledge as received that which I promised to you?" and by Titius replying: "I do." An acceptilation can also be made in the Greek language; provided only it be worded as it would be in Latin: ἔχεις λαβὼν δηνάρια τόσα; Ἐχω λαβὼν. By this process, as we have said, only verbal obligations can be dissolved, and not the other kinds¹; for it seemed reasonable that an obligation made by words should be capable of being dissolved by other words². But still a debt which is due on other grounds can be converted into a stipulation and dissolved by acceptilation. And just as a debt can be lawfully paid in part, so also can an acceptilation of a debt be effected in part. 2. A stipulation has been invented,

¹ This only means that no other varieties could be dissolved *ipso jure* by an acceptilation; in suits upon real, literal or consensual obligations an acceptilation would, of course, furnish matter for an *exceptio*; "quia

iniquum foret condemnari;" IV. 13. 3; D. 2. 14. 27. 9.

² The principle is stated more generally in D. 50. 17. 35; "nihil tam naturale est, quam eo genere quidquid dissolvere quo colligatum est."

dita stipulatio quae vulgo Aquiliana appellatur, per quam stipulationem contingit, ut omnium rerum obligatio in stipulatum deducatur, et ea per acceptilationem tollatur. stipulatio enim Aquiliana novat¹ omnes obligationes, et a Gallo Aquilio² ita composita est: quicquid te mihi ex quacumque causa dare facere oportet, oportebit, praesens in diemve, quarumque rerum mihi tecum actio, quaeque abs te petitio, vel adversus te persecutio est, erit, quodve tu meum habes, tenes, possides, possedisti, dolove malo fecisti quo minus possideas: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit Numerius Negidius. item ex diverso Numerius Negidius interrogavit Aulum Agerium: quicquid tibi hodierno die per Aquilianam

commonly called the Aquilian, whereby it is brought about that obligations of all kinds are turned into a stipulation, and then dissolved by acceptilation. For the Aquilian stipulation *novates*¹ all obligations, and was drawn up in these terms by Gallus Aquilius²: "Whatsoever it is your duty or shall be your duty to give to me or to do for me on any account, at once or on a future day; for whatsoever matters I have or shall have against you an *actio*, *petitio* or *persecutio*: whatsoever of mine you have, hold, possess or have possessed, or by fraud have caused yourself no longer to possess: of whatsoever value each of these matters shall be; for such amount of money to be given hath Aulus Agerius stipulated and Numerius Negidius engaged himself." And then on the other part Numerius Negidius interrogated Aulus Agerius: "For whatsoever I have this day engaged myself by the Aquilian stipulation, do you acknowledge all this as

¹ See § 3 below.

² Gallus Aquilius was a contemporary and friend of Cicero, and his colleague in the praetorship, B.C. 65. Cicero himself mentions improvements made by Gallus in the procedure in cases of fraud (*De Off.* III. 14), and also names him in the *De Nat. Deor.* III. 30, and *pro Caecina*,

27; Scaevola, in a passage quoted in D. 28. 2. 29, ascribes to him the invention of a form for instituting *postumi sui*: and Pomponius speaks in high terms of his legal acumen, D. 1. 2. 42.

For a full discussion of the phraseology of the Aquilian stipulation see App. N.

stipulationem spopondi, id omne habesne acceptum? respondit Aulus Agerius: habeo acceptumque tuli.

3. Praeterea novatione tollitur obligatio, veluti si id quod tu Seio debeas a Titio dari stipulatus sit. nam interventu novae personae nova nascitur obligatio, et prima tollitur translata in posteriorem: adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur¹. veluti si id quod tu Titio debebas a pupillo sine tutoris auctoritate stipulatus fuerit. quo casu res amittitur: nam et prior debitor liberatur, et posterior obligatio nulla est. non idem iuris est, si a servo quis stipulatus fuerit: nam tunc prior proinde obligatus manet, acsi postea nullus stipulatus fuisset. Sed si eadem persona sit a qua postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit,

received?" and Aulus Agerius answered: "I have it, and have set it down as received."

3. An obligation is also dissolved by *novation*; for instance, if Seius stipulate that what is owed by you to him shall be given by Titius. For by the introduction of a new person a new obligation arises, and the original one is dissolved by being transmuted into the later one: so that, sometimes, although the later stipulation be void, yet the original one is dissolved by virtue of the novation¹; for example, if Titius stipulate with a pupil, without the authorization of his tutor, for payment of what you owe to him. In such a case the thing is lost: for the original debtor is set free, and the later obligation is null. The rule is not the same when a man stipulates for something to be given by a slave: for then the original debtor remains bound, just as if no one had stipulated subsequently. But if the person with whom you make the subsequent stipulation be the same as before, there is a novation only in case there be something new in the later stipulation;

¹ This paragraph is in the main a quotation from Gaius III. 176. The contract superseded in a novation might be of any kind, real, verbal, literal, or consensual, but that by which it was superseded was always a stipulation: the original contract further might be natural, civil, or praetorian, and the superseding contract too might be binding either civilly, under the edict,

or naturally. These points are clearly laid down by Ulpian, see D. 46. 2. 1. 1. The obligation entered into by a pupil is binding naturally, therefore supersedes the original contract, but will not be enforced by the civil law: that entered into by a slave is not binding either naturally or civilly, therefore causes no novation, and the old contract remains effective.

forte si condicio aut dies aut fideiussor adiiciatur aut detrahatur. Quod autem diximus, si condicio adiiciatur, novationem fieri, sic intellegi oportet, ut ita dicamus factam novationem, si condicio extiterit; alioquin, si defecerit, durat prior obligatio. Sed cum hoc quidem inter veteres constabat, tunc fieri novationem cum novandi animo in secundam obligationem itum fuerat; per hoc autem dubium erat, quando novandi animo videretur hoc fieri, et quasdam de hoc praesumptiones alii in aliis casibus introducebant: ideo nostra processit constitutio¹, quae apertissime definivit tunc solum fieri novationem, quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioquin manere et pristinam obligationem, et secundam ei accedere, ut maneat ex utraque causa obligatio secundum nostrae constitutionis definitiones, quas licet ex ipsius lectione apertius cognoscere.

4. Hoc amplius: hae obligationes quae consensu contra-

for instance, if a condition, or a day (of payment), or a surety, be added or removed. Yet our assertion that a novation takes place if a condition be inserted must be thus understood, that we mean that a novation takes place in case the condition comes to pass; if, on the contrary, it fail, the original obligation stands good. But although the ancients agreed that a novation took place when the parties entered on the second obligation with an intention of novating: yet there was a doubt as to the circumstances under which it was to be considered that they acted with this intention of novating; and various presumptions were laid down, by some lawyers to meet one case, by others to meet another; therefore a constitution has been published by ourselves¹, which has decided most expressly, that there is only to be a novation when it has been stated by the parties themselves that they have made their new agreement in order to a novation of the former obligation: otherwise the original obligation is to stand good and the second to be added to it; in such wise that an obligation is to spring from each transaction, according to the provisions of our constitution, which you may learn more clearly by reading the constitution itself.

4. Besides the above methods, those obligations which are

¹ C. 8. 42. 8.

huntur contraria voluntate dissolvuntur¹. nam si Titius et Seius inter se consenserint, ut fundum Tusculanum emptum Seius haberet centum aureorum, deinde re nondum secuta, id est neque pretio soluto neque fundo tradito, placuerit inter eos, ut discederetur ab ea emptione et venditione, invicem liberantur. idem est et in conductione et locatione et in omnibus contractibus qui ex consensu descendunt, sicut iam dictum est.

formed by consent are dissolved by change of intention¹. For if Titius and Seius have agreed together that the Tusculan estate shall be bought by the latter for one hundred *aurei*; and then before execution has followed, i.e. before the price has been paid or the land delivered, they consent to a withdrawal from this buying and selling, they are freed each from the other. The rule is the same as to letting and hiring and all contracts based upon consent, as we have just stated.

¹ On the principle enunciated in D. 50. 17. 35, quoted above in a note on p. 337.

BOOK IV.

TIT. I. DE OBLIGATIONIBUS QUAE EX DELICTO NASCUNTUR.

Cum expositum sit superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur ut de obligationibus ex maleficio dispiciamus¹. Sed illae quidem, ut suo loco tradidimus, in quattuor genera dividuntur: hae vero unius generis sunt, nam omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut iniuria.

1. Furtum est contractatio rei fraudulosa, vel ipsius rei vel etiam usus eius possessionisve²; quod lege naturali pro-

TIT. I. ON OBLIGATIONS ARISING FROM DELICT.

Inasmuch as in the preceding book the exposition of obligations *ex contractu* and *quasi ex contractu* has been given, our next topic for consideration is obligations *ex maleficio*¹. The former set, as we showed in the proper place, are arranged in four classes; but the latter are comprised in one class; for they all of them arise from a transaction (*ex re*), that is, from the actual misfeasance, as for instance from theft, from robbery with violence, from damage or from injury.

1. Theft is a fraudulent dealing with some thing, whether it be the thing itself or merely the use or possession of it²; and

¹ It must be carefully noted that the actions mentioned in this Title and the three or four which follow are civil actions, not criminal. *Furtum*, *rapina*, etc., could also form the matter of criminal proceedings, but with this fact we have at present nothing to do.

² D. 47. 2. 1. 3. We can gather no direct information from the old authorities as to the precise nature of the kind of theft called *furtum*

possessionis. Theophilus explains the meaning of the term thus: "When I possess as owner that which has been handed over to me for possession by way of pledge or deposit:" see also *Basilica* LX. 12. According to Gellius (*Noct. Att.* xi. 18), Sabinus' explanation was as follows: "Condemnatum furti qui fundo quem conduxerat vendito, possessione ejus dominium intervertisset." From the passage before us, however, coupled

hibitum est admittere¹. (2.) Furtum autem vel a furvo², id est nigro, dictum est, quod clam et obscure fit et plerumque nocte³; vel a fraude; vel a ferendo, id est auferendo; vel a Graeco sermone⁴, qui φῶρας appellant fures. imo etiam Graeci ἀπὸ τοῦ φέρειν φῶρας dixerunt.

3. Furtorum autem genera duo sunt: manifestum et nec manifestum. nam conceptum et oblatum species potius actionis sunt furto cohaerentes quam genera furtorum, sicut inferius apparebit. Manifestus fur est quem Graeci ἐπ' αὐτοφώρῳ appellant⁵: nec solum is qui in ipso furto deprehenditur, sed etiam is qui eo loco deprehenditur quo fit, veluti qui domi furtum fecit et nondum egressus ianuam deprehensus

the commission of theft has been forbidden by natural law¹. 2. Now *furtum* has been derived either from *furvus*², that is black, because the act is committed secretly and darkly, and generally by night³, or from *fraus* (fraud), or from *ferendo*, that is "carrying away;" or from a Greek word⁴, for the Greek name for thieves is φῶρες. The Greeks too derive their word φῶρες from φέρειν, to carry.

3. There are two kinds of theft, manifest and non-manifest; for concept and oblate are rather specific actions attaching to theft than kinds of theft, as will appear further on. A manifest thief is that one whom the Greeks call ἐπ' αὐτοφώρῳ⁵ (caught in the act); being not only he who is detected in the act of thieving, but he also who is detected in the place where the act is committed, as for instance he who has committed a theft in a house and has been caught before he has passed the door, or he who

with §§ 6 and 10, we see that *furtum possessionis* could be committed by the owner of a thing who removes it from the lawful possession of another person; and so too is the rule in D. 47. 2. 74. This would certainly seem to be the more natural explanation; inasmuch as in the cases specified by Theophilus and Sabinus that which is stolen is the thing itself, apart from its possession; whilst in those specified in the Digest and the Institutes that which is stolen is the possession of the thing from him who is entitled

to its possession.

¹ Cic. *De Off.* III. 5. Augustin. *Confess.* II. 4. 1: "Furtum certe punit lex scripta in cordibus hominum."

² "Veteres Romani furvum atrum appellaverunt." A. Gell. *Noct. Att.* I. 18.

³ D. 47. 2. I. pr. Servius in *Virg. Aen.* IX. 350.

⁴ "Quod a Graecis nunc κλέπτης dicitur antiquiore lingua φῶρ dictum est." A. Gell. *Noct. Att.* I. 18.

⁵ Hence the maxim "arguit furem locus et deprehensio."

fuerit, et qui in oliveto olivarum aut in vineto uvarum furtum fecit, quamdiu in oliveto aut in vineto fur deprehensus sit; imo ulterius furtum manifestum extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fuerit, sive in publico sive in privato, vel a domino vel ab alio, antequam eo perveniret quo perferre ac deponere rem destinasset¹. sed si pertulerit quo destinavit, tamenetsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit, ex his quae diximus intellegitur: nam quod manifestum non est, id scilicet nec manifestum est. (4.) Conceptum furtum dicitur, cum apud aliquem testibus praesentibus furtiva res quaesita et inventa sit: nam in eum propria actio constituta est, quamvis fur non sit, quae appellatur concepti². Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata sit, eaque apud te concepta sit; utique si ea mente tibi data fuerit, ut apud te potius quam apud eum qui

has committed a theft of olives in an oliveyard, or of grapes in a vineyard, provided he be caught in the oliveyard or vineyard; nay, manifest theft must be further extended to the case where the person has been seen or detected with the thing in his hands, either in a public or private place, and either by the owner or some one else, before his arrival at the place where he intended to transport and place the thing¹; but if he have transported it to its place of destination and then be detected with the stolen property (in his possession) he is not a manifest thief. The meaning of non-manifest theft is intelligible from what we have just stated; for that which is not manifest is non-manifest. 4. A theft is termed *concept* when the stolen thing is sought for and found in any one's possession in the presence of witnesses; for there is a particular kind of action set out against him, even though he be not the thief, called the *actio concepti*². A theft is called *oblato*, when the stolen thing has been put on your premises by any one and is found there; that is to say if it have been given to you with the intention that it should be found with you rather than with him who gave it; for there is a particular kind of action set

¹ Cf. D. 47. 2. 4; where the words *eo die* are added, in order to cure the doubt raised in Gaius III. 184,

"unius diei an etiam plurium dierum spatio id terminandum sit."

² Gaius III. 186—188.

dederit conciperetur. nam tibi, apud quem concepta sit, propria adversus eum qui obtulit, quamvis fur non sit, constituta est actio, quae appellatur oblatus. Est etiam prohibiti furti actio adversus eum qui furtum quaerere testibus praesentibus volentem prohibuerit. Praeterea poena constituitur edicto Praetoris per actionem furti non exhibiti adversus eum qui furtivam rem apud se quaesitam et inventam non exhibuit. Sed hae actiones, id est concepti et oblatus, et furti prohibiti, nec non furti non exhibiti, in desuetudinem abierunt. cum enim requisitio rei furtivae hodie secundum veterem observationem non fit¹: merito ex consequentia etiam praefatae actiones ab usu communi recesserunt, cum manifestissimum est, quod omnes qui scientes rem furtivam susceperint et celaverint furti nec manifesti obnoxii sunt. (5.) Poena manifesti furti quadrupli est, tam ex servi persona, quam ex liberi²; nec manifesti dupli.

out for you in whose hands the thing is found against him who put the thing into your hands, even though he be not the thief, called the *actio oblatus*. There is also an *actio prohibiti furti* against one who offers resistance to a person wishing to search for a stolen thing in the presence of witnesses. Moreover, a penalty is imposed under the Praetor's edict by means of the *actio furti non exhibiti* against him who has not produced the thing which was sought for and found in his possession. These actions, however, viz. *concepti, oblatus, furti prohibiti* and *furti non exhibiti*, have fallen into disuse; for inasmuch as the search for stolen property is not conducted at the present day according to the ancient forms¹, the above-mentioned actions have in consequence very properly gone out of common use; for it is quite clear that all who have knowingly received stolen property and concealed it are liable to the charge of non-manifest theft. 5. The penalty for a manifest theft is fourfold (the value of the thing stolen), whether the offender be slave or free²; that for a non-manifest theft is double (such value).

¹ These forms are described by Gaius; III. 192, 193.

² This is a praetorian amelioration of the old decemviral law, by which

the punishment for manifest theft was death, or stripes and imprisonment. See A. Gell. *Noct. Att.* xi. 18; Gaius III. 189. This fourfold penalty is

6. Furtum autem fit non solum cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quis alienam rem invito domino contractat. Itaque sive creditor pignore, sive is apud quem res deposita est, ea re utatur, sive is qui rem utendam accepit in alium usum eam transferat quam cuius gratia ei data est, furtum committit. veluti si quis argentum utendum acceperit, quasi amicos ad coenam invitaturus, et id peregre secum tulerit, aut si quis equum gestandi causa commodatum sibi longius aliquo duxerit; quod veteres scripserunt de eo qui in aciem equum perduxisset¹. (7.) Placuit tamen eos qui rebus commodatis aliter uterentur quam utendas acceperint, ita furtum committere, si se intellegant id invito domino facere, eumque, si intellexisset, non permissurum; ac si permissurum credant, extra crimen videri: optima sane distinctione, quia furtum sine affectu furandi non committitur. (8.) Sed et si credat aliquis invito domino

6. A theft takes place not only when a man removes another's property with the intention of appropriating it, but generally when any one deals with what belongs to another against the will of the owner. Therefore, whether a pawnee or a depository make use of the pledge or the deposit, or whether the usuary of something turn it to another use than that for which it was given, he commits theft: for example, if a man have received silver plate for use, as if about to invite friends to supper, and carry it abroad with him; or if a person take with him to a distance a horse lent him for the purpose of a ride; and the instance the old writers gave of this was a man's taking a horse to battle¹. 7. It has been decided, however, that they who employ borrowed things for other uses than those for which they received them, only commit a theft in case they are aware they are doing this against the will of the owner, and that if he knew of the proceeding he would not allow it: and if they believe he would allow it, they are not liable to the charge of theft: the distinction being a very proper one, since theft is not committed without wrongful intent. 8. And even if a man believe that he is dealing

mentioned by Plautus; *Curculio* v. ii. 21. The Praetor left unchanged the decemviral penalty for *furtum nec manifestum*.

¹ This paragraph is quoted from Gaius, and so are the two next following: see Gaius III. 196—198.

se rem commodatam sibi contractare, domino autem volente id fiat, dicitur furtum non fieri. unde illud quaesitum est, cum Titius servum Maevii sollicitaverit, ut quasdam res domino subripiat et ad eum perferat, et servus id ad Maevium pertulerit, Maevius, dum vult Titium in ipso delicto deprehendere, permiserit servo quasdam res ad eum perferre, utrum furti, an servi corrupti iudicio teneatur Titius, an neutro? et cum nobis super hac dubitatione suggestum est, et antiquorum prudentium super hoc altercationes perspeximus, quibusdam neque furti neque servi corrupti actionem praestantibus, quibusdam furti tantummodo: nos huiusmodi calliditati obviam euntes, per nostram decisionem sanximus, non solum furti actionem, sed etiam servi corrupti contra eum dari¹: licet enim is servus deterior a sollicitatore minime factus est, et ideo non concurrant regulae quae servi corrupti actionem intro-

against the owner's will with a thing lent to him, the proceeding really being agreeable to the owner's will, it is said there is no theft committed. Hence this question has been raised; Titius having made proposals to Maevius's slave to steal certain things from his master and bring them to him, and the slave having informed Maevius of this, Maevius, wishing to convict Titius in the act, allowed the slave to take certain things to him: is Titius liable upon the action of theft, or upon that for the corruption of a slave, or upon neither? Now whereas the doubt hereon has been referred to us, and we have examined the discussions of the ancient lawyers relating to the matter (some of whom maintain that neither the action of theft nor the action for corruption of a slave will lie; whilst others hold that the action of theft alone can be brought); we, intending to dispose of subtleties of this sort, have by our decision established that not only the action of theft will lie against the defendant but also the one for the corruption of a slave¹; for though the slave may not have been made worse by the individual soliciting him, and so the hypothesis upon which the action for the corruption of a slave was framed may not be

¹ The doubt alluded to by Justinian in the above passage arose from some ancient rulings upon the clause of the Praetor's edict which ran thus: "Whoever shall be shown to have

harboured a slave, male or female, belonging to another, or to have solicited him or her with the evil intent of making him or her worse in character; I will assign against

ducerent, tamen consilium corruptoris ad perniciem probitatis servi introductum est, ut sit ei poenalis actio imposita, tamquam re ipsa fuisset servus corruptus; ne ex huiusmodi impunitate et in alium servum qui possit corrumpi tale facinus a quibusdam pertentetur. (9.) Interdum etiam liberorum hominum furtum fit, veluti si quis liberorum nostrorum qui in potestate nostra sunt subreptus fuerit¹. (10.) Aliquando etiam suae rei quisque furtum committit, veluti si debitor rem quam creditori pignoris causa dedit subtraxerit².

11. Interdum furti tenetur qui ipse furtum non fecerit: qualis est cuius ope et consilio furtum factum est. in quo numero est qui tibi nummos excussit, ut alius eos raperet; aut obstitit tibi, ut alius rem tuam exciperet; vel oves aut boves tuas fugavit, ut alius eas caperet; et hoc veteres scrip-

precisely applicable, yet the object of the corruptor was the ruin of the slave's honesty; so that the penal action is applied to him, just as though the slave had in very fact been corrupted; in order that no such misdeed may be perpetrated by other persons upon some more tractable slave in consequence of the impunity in this case. 9. Sometimes there can be theft even of free persons; for instance, if one of our descendants who are under our *potestas* be abducted¹. 10. Sometimes too a man commits a theft of his own property, as when a debtor takes away by stealth a thing he has given in pledge to his creditor².

11. Sometimes a man is liable for a theft who has not himself committed it: of such kind is he by whose aid and counsel a theft has been committed: and in this category must be included one who has struck money out of your hand that another may carry it off, or has put himself in your way that another may carry off your property, or has scattered your sheep or oxen that another may take them; and the instance the ancient writers gave of this was a man's scattering a herd

such wrong-doer an action for double the value.⁸ The construction which Ulpian and others put upon the words, "quo eum deteriorem faceret," was that the regulation of the edict could not have been infringed, unless the evil counsel was followed

by a wrongful act, or, at any rate, by a wrongful design on the slave's part.

¹ Gaius III. 199.

² Gaius III. 200. See note on § 1 above.

serunt de eo qui panno rubro fugavit armentum. Sed si quid eorum per lasciviam, et non data opera, ut furtum admitteretur, factum est, in factum actio dari debeat¹. At ubi ope Maevii Titius furtum fecerit, ambo furti tenentur. Ope consilio eius quoque furtum admitti videtur, qui scalas forte fenestris supposuit, aut ipsas fenestras vel ostium effregit, ut alius furtum faceret, quive ferramenta ad effringendum, aut scalas ut fenestris supponerentur commodaverit, sciens cuius gratia commodaverit. Certe qui nullam operam ad furtum faciendum adhibuit, sed tantum consilium dedit, atque hortatus est ad furtum faciendum, non tenetur furti². (12.) Hi qui in parentum vel dominorum potestate sunt si rem eis subripiant, furtum quidem illis faciunt, et res in furtivam causam cadit (nec ob id ab ullo usucapi potest, antequam in domini potestatem revertatur), sed furti actio non nascitur, quia nec ex alia ulla causa potest inter eos actio nasci³: si vero ope consilio alterius furtum factum fuerit, quia utique

by means of a red rag. Although if any of these acts be done in wantonness, and not expressly for the purpose of committing a theft, an action "upon the fact" ought to be given¹. But when Titius has committed a theft with Maevius's aid, both are liable to the action of theft. Theft is also committed by the aid and counsel of one who has, for instance, placed a ladder near a window, or has broken a window or a door in order that another may commit a theft, or who has lent iron implements for breaking in or a ladder to be placed against a window, knowing the purpose for which he lent them. Clearly where a person has rendered no actual aid towards the commission of a theft, but only given advice and persuasion thereto, he is not liable to the action of theft². 12. If persons under the *potestas* of ascendants or masters subtract anything belonging to them, they commit a theft against them, and the thing subtracted falls into the condition of stolen property, and therefore no usucaptive title to it can be made out by any one before it is restored to the owner's hands; but an action of theft does not arise, because no action can arise between these parties from any cause at all³. Where, however, the theft has been committed through the aid and counsel of another, seeing that theft

¹ See App. O.

² D. 50. 16. 53. 2.

³ D. 47. 2. 16; D. 47. 2. 17. pr.;
D. 47. 2. 36. 1.

furtum committitur, convenienter ille furti tenetur, quia verum est ope consilio eius furtum factum esse.

13. Furti autem actio ei competit cuius interest rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si eius intersit rem non perire¹. (14.) Unde constat creditorem de pignore subrepto furti agere posse, etiamsi idoneum debitorem habeat, quia expedit ei pignori potius incumbere quam in personam agere: adeo quidem, ut quamvis ipse debitor eam rem subripuerit, nihilominus creditori competat actio furti². (15.) Item si fullo polienda curandave, aut sarcinator sarcienda vestimenta mercede certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil interest eam rem non perisse cum iudicio locati a fullone aut sarcinatore rem suam persequi potest. Sed et bonae fidei emptori subrepta re quam emerit, quamvis dominus non sit³, omnimodo competit furti actio,

has undoubtedly been committed, the abettor is very properly liable to the action of theft, because it is clear that the theft was committed owing to his aid and advice.

13. The action of theft can be brought by any one who has an interest that the thing should be safe, even though he be not the owner: and thus again it does not lie for the owner unless he have an interest that the thing should not perish¹.

14. Hence it is an admitted principle that a creditor can bring an action of theft for a pledge which has been carried off, even though he has a debtor able to pay; because it is to the creditor's advantage rather to rely upon the pledge than to bring a personal action: so that even if the debtor himself have carried it off, nevertheless the action of theft is open to the creditor². 15. Likewise, if a fuller have taken garments to smooth or clean, or a tailor to patch, for a settled hire, and have lost them by theft, it is he who has the action of theft and not the owner, because the owner has no interest in the thing not perishing, since he can by an action of letting recover his own property from the fuller or tailor. Moreover, when something is wrongfully abstracted from a bona fide purchaser after his purchase, an action of theft is quite as much open to him, although he is not the owner³, as it would be to a creditor;

¹ Gaius III. 203.

² Gaius III. 204.

³ The ownership does not pass till the price is paid; II. 1. 41; and yet the

quemadmodum et creditori. fulloni vero et sarcinatori non aliter furti competere placuit, quam si solvendo sint, hoc est si domino rei aestimationem solvere possint; nam si solvendo non sunt, tunc, quia ab eis suum dominus consequi non possit, ipsi domino furti actio competit, quia hoc casu ipsius interest rem salvam esse. idem est¹ et si in partem solvendo sint fullo aut sarcinator. (16.) Quae de fullone et sarcinatore diximus, eadem et ad eum cui commodata res est, transferenda veteres existimabant: nam ut ille fullo mercedem accipiendo custodiam praestat, ita is quoque qui commodum utendi percipit similiter necesse habet custodiam praestare². Sed nostra providentia etiam³ hoc in decisionibus nostris⁴ emendavit, ut in domini sit voluntate, sive commodati actionem adversus eum qui rem commodatam accepit movere desiderat, sive furti adversus eum qui rem subripuit⁵, et alter-

but in the case of the fuller or tailor it has been held that the action of theft can be brought by them only if they be solvent, that is if they can provide the value of the thing for the owner; for if they be insolvent, then since the owner cannot recover his own from them, the action of theft is open to the owner himself; for in this case he has an interest in the thing being safe; and the same doctrine holds when the fuller or tailor is partly solvent¹. 16. These remarks about the fuller or tailor the old lawyers thought should be applied to one who has received an article on loan; for just as the fuller of whom we have been speaking by receiving hire becomes liable for safe keeping, precisely so does the borrower who enjoys the benefit of the use necessarily become responsible for custody². But this point too³ our forethought has amended by our decisions⁴, leaving it to the owner's choice whether he prefers to bring an action of loan against the borrower or an action of theft⁵ against the person who has removed the article: although

risk is no longer the vendor's, but falls on the purchaser from the moment the contract is made; III. 23. 3.

¹ There is some doubt whether *idem* refers to the doctrine in the first or in the second paragraph. Probably, however, it refers to the rule first laid down, and means that

the fuller or tailor, if partly solvent, is able to bring an action. See the last note on § 17 below.

² Gaius III. 206.

³ *Etiam*, sc. *sicut multa alia*.

⁴ C. 6. 2. 22.

⁵ The owner can in any case bring a *vindicatio* or *condictio* against the

utra earum electa, dominum non posse ex poenitentia ad alteram venire actionem. sed si quidem furem elegerit, illum qui rem utendam accepit penitus liberari. sin autem commodator veniat adversus eum qui rem utendam accepit: ipsi quidem nullo modo competere posse adversus furem furti actionem, eum autem qui pro re commodata convenitur posse adversus furem furti habere actionem. ita tamen, si dominus sciens rem esse subreptam, adversus eum cui res commodata fuit pervenit; sin autem nescius, et dubitans rem non esse apud eum, commodati actionem instituit, postea autem re comperta voluit remittere quidem commodati actionem, ad furti autem pervenire, tunc licentia ei concedatur, et adversus furem venire, nullo obstaculo ei opponendo, quoniam incertus constitutus movit adversus eum qui rem utendam accepit commodati actionem (nisi domino ab eo satisfactum est: tunc etenim omnimodo furem a domino quidem furti actione liberari, suppositum autem esse ei qui pro re sibi

when he has elected one action, he cannot change his mind and resort to the other. If then he elect to sue the thief, the man who received the thing for use is entirely absolved: whilst if the lender prefer to sue the receiver for use, an action of theft can by no possibility be brought by him against the thief, although one can be instituted by the person who has been sued in respect of the thing lent. These are the rules, supposing the owner proceeds against the borrower, knowing that the article has been stolen; but if he commenced the action of loan in ignorance, or doubting as to the article not being in the borrower's possession, and afterwards on discovering the truth, desired to abandon the action of loan and resort to that of theft; in such case permission must be granted him to proceed against the thief, and no obstacle be put in his way; because of the fact that when he instituted the action of loan against the receiver for use, he did so in a state of uncertainty (provided only that compensation has not been made by the borrower to the owner; for then the thief is entirely freed from the owner's action of theft, and made liable instead

thief; see § 19 below; but the question here discussed is whether he can bring the penal action, *actio furti*,

as well as the action for recovery or compensation.

commodata domino satisfecit), cum manifestissimum est, etiamsi ab initio dominus actionem instituit commodati, ignarus rem esse subreptam, postea autem hoc ei cognito adversus furem transivit, omnimodo liberari eum qui rem commodatam accepit, quemcumque causae exitum dominus adversus furem habuerit: eadem definitione obtinente, sive in partem sive in solidum solvendo sit is qui rem commodatam accepit¹. (17.) Sed is apud quem res deposita est custodiam non praestat, sed tantum in eo obnoxius est, si quid ipse dolo malo fecerit²: qua de causa, si res ei subrepta fuerit, quia restituendae eius rei nomine depositi non tenetur, nec ob id

to the person who has compensated the owner for the thing lent); at the same time it is most clear that even if it were through ignorance of the fact of the article being stolen that the owner originally began the action of loan, yet if he afterwards on learning that circumstance prefer to sue the thief, the receiver of the loan is entirely discharged, whatever be the result of the action against the thief; and the same principle is applicable whether the borrower be partially or entirely solvent¹. 17. But a person with whom a thing is deposited is not responsible for its keeping, being only answerable for what he himself does wilfully²: therefore if the thing be stolen from him, he can bring no action of theft, because he is not liable to make restoration of the article on the ground of the deposit, and hence has no

¹ If the borrower be perfectly solvent, the owner who proceeds against him gets full compensation and needs no other remedy: if the borrower be partly solvent, the owner who sues him compels him in self-defence to sue the thief, and being partially solvent, i.e. able to recompense the owner in part before he recovers from the thief, he must be able to pay him in full when the thief has been made to refund: if, however, the borrower be wholly insolvent, he may be worse than penniless, i.e. he may owe debts of prior obligation, and then his recovery of compensation from the thief will do the owner no good, or only partially replace his loss. There-

fore in this last case the owner, just as in the case named in § 15, can sue the thief *after suing* the borrower.

² The general rule in contracts was that the person benefited was liable for *culpa levis*, i.e. for even trivial negligence, whilst the person on whom the burden was cast was only liable for *culpa lata*, i.e. for gross negligence. *Dolus* imports a wilful injury: *culpa* an unintentional damage, but one caused by negligence. Hence the depository would be liable for *dolus* and *culpa lata*. But Gaius (from whom this passage is borrowed) probably had in his mind the well-known maxim, "*culpa lata dolo aequiparatur*."

eius interest rem salvam esse, furti agere non potest, sed furti actio domino competit.

18. In summa sciendum est quaesitum esse, an impubes rem alienam amovendo furtum faciat. et placet quia furtum ex affectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit¹, et ob id intellegat se delinquere.

19. Furti actio, sive dupli sive quadrupli, tantum ad poenae persecutionem pertinet: nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre². sed vindicatio quidem adversus possessorem est, sive fur ipse possidet sive alius quilibet; condictio autem adversus ipsum furem heredemve eius, licet non possideat, competit³.

interest in its being safe; but the action of theft is maintainable by the owner.

18. Finally we must observe that it has been a disputed point whether a child under puberty commits a theft by removing the property of another person; and it is now held that as theft depends on the intent, he is only liable to the charge if he be very near puberty¹, and therefore aware that he is doing wrong.

19. The action of theft, whether for double or quadruple value, only tends to the recovery of a penalty, for the owner has a distinct process for the recovery of the article, namely either by vindication or by condictio². The vindicatory process, however, lies against the possessor, whether he be the thief or some other person, whilst the condictive action lies against the thief or his heir, even though out of possession³.

¹ The meaning of *pubertati proximus* is discussed in our note on III. 19. 10.

² IV. 6. 18.

³ Penal actions do not in general lie against the heir of the wrongdoer, unless he has benefited by the wrong: but the *actio furti* was an exception, as is stated explicitly by Ulpian in D. 13. 1. 9. There is another instance mentioned in D. 43. 4. 1. 8, viz. when proceedings were taken because violence had been used to eject a grantee of pos-

session under the Praetor's edict; and perhaps a third is implied, viz. the *actio repetundarum*, in D. 48. 11. 2. Why the heir of a thief was in a worse position than the heir of any other offender is not exactly known, but the stringency of the laws of Rome relating to theft is a well-established fact, and another instance of it is the right of the person robbed to bring a *condictio*, even though able to proceed by *vindicatio*: see IV. 6. 14, Gaius IV. 4.

TIT. II. DE VI BONORUM RAPTORUM.

Qui res alienas rapit tenetur quidem etiam furti : quis enim magis alienam rem invito domino contractat quam qui vi rapit? ideoque recte dictum est eum improbum furem esse. sed tamen propriam actionem eius delicti nomine Praetor introduxit, quae appellatur vi bonorum raptorum ; et est intra annum quadrupli, post annum simpli. quae actio utilis est, etiam si quis unam rem, licet minimam, rapuerit. quadruplum autem non totum poena est, et extra poenam rei persecutio, sicut in actione furti manifesti diximus : sed in quadruplo inest et rei persecutio, ut poena tripli sit, sive comprehendatur raptor in ipso delicto, sive non. ridiculum est enim levioris esse condicionis eum qui vi rapit, quam qui clam amovet¹.

TIT. II. ON ROBBERY WITH VIOLENCE.

He who takes by violence the goods of another is liable for theft also, for who deals with another's property more completely against the owner's will than one who carries it off by violence? And therefore it is rightly said that he is an atrocious thief. But the Praetor has further introduced a special action in respect of this delict, which is called the *actio vi bonorum raptorum* ; and is for fourfold value if brought within the year, and for the single value if brought after the year. This action is available when a man has taken by violence a single thing, however small it may be. The fourfold value, however, is not altogether a penalty, nor is there a recovery of the article as well, such as we mentioned when speaking of the action of manifest theft; but the recovery of the article is included in the fourfold value, so that the penalty is thrice the value, whether the wrong doer be caught in the act or not ; for it is absurd that one who carries off property by violence should be looked upon as more unimportant than one who removes it secretly¹.

¹ This remark of course has reference to the *sive non* in the preceding clause : the robber who was not caught on the spot was liable to a more severe penalty than a mere

fur nec manifestus ; but one caught in the act could be treated as a *fur manifestus* and pay a heavier penalty than a *raptor*.

(1.) Quia tamen ita competit haec actio, si dolo malo quisque rapuerit: qui aliquo errore inductus, suam rem esse existimans, et imprudens iuris¹ eo animo rapuit quasi domino liceat rem suam etiam per vim auferre a possessoribus, absolvi debet. cui scilicet conveniens est nec furti teneri eum qui eodem hoc animo rapuit. Sed ne dum talia excogitentur, inveniatur via per quam raptores impune suam exerceant avaritiam: melius divalibus constitutionibus² pro hac parte prospectum est, ut nemini liceat vi rapere rem mobilem vel se moventem, licet suam eandem rem existimet; sed si quis contra statuta fecerit, rei quidem suae dominio cadere, sin autem aliena sit, post restitutionem eius etiam aestimationem eiusdem rei praestare³. quod non solum in mobilibus rebus quae rapi possunt constitutiones obtinere censuerunt, sed etiam in invasionibus

1. Now inasmuch as this action is available only where a man has robbed with fraudulent design; when a person through some mistake, thinking the thing removed to be his own, and acting in ignorance of the law¹, has carried it off under the impression that one who is owner may remove his own property even violently from the hands of its possessors, he ought to be acquitted. And it is clearly consistent with this principle that one who has under such impression seized and carried away anything, should not be held liable even for theft. But lest under cover of these distinctions some method should be devised for robbers to gratify their greed with impunity, it has been wisely provided by constitutions of the Emperors² that no person may remove by violence a thing that is moveable or which can move itself, even though he believe it to be his own; and when a person acts contrary to these ordinances, he loses the ownership of the property, if it be his own; whilst if it belong to another person, after restitution made he is liable also to pay the value of the thing³. And this rule the constitutions have declared to apply not only to moveable things which can be carried away by force, but also to violent

¹ For it is illegal to take even your own property by violence. D. 47. 8. 2. 18. He is therefore liable to other proceedings, though clear of the offence of *rapina*, as is stated *elo w.*

² Especially in the constitution of Marcus, which is twice quoted in the Digest, viz. in D. 4. 2. 13 and D. 48. 7. 7. See also Cod. Theod. 4. 22. 3, Cod. Just. 8. 4. 7.

³ IV. 15. 6.

quae circa res soli fiunt, ut ex hac causa omni rapina homines abstineant¹. (2.) Sane in hac actione non utique expectatur rem in bonis actoris esse²: nam sive in bonis sit sive non sit, si tamen ex bonis sit, locum haec actio habebit. Quare sive commodata sive locata sive pignerata sive etiam deposita sit apud Titium, sic ut intersit eius eam non auferri, veluti si in re deposita culpam quoque promisit³, sive bona fide possideat, sive usumfructum in ea quis habeat vel quod aliud ius, ut intersit eius non rapi: dicendum est competere ei hanc actionem, ut non dominium accipiat, sed illud solum quod ex bonis eius qui rapinam passus est, id est quod ex substantia eius ablatum esse proponatur⁴. et generaliter dicendum est, ex quibus causis

intrusions affecting objects connected with the soil; in order that men may for this reason abstain from all species of robbery by force¹. 2. In this action there is clearly no necessity that the article should be part of the plaintiff's property²; for whether it be so or not, the action will be applicable, provided only it was removed from his property. Therefore, if it have been lent for use, or let or pledged to Titius, or even deposited with him in such manner as to make it a matter of interest to him that it should not be removed; as for instance where in the case of a deposit he made himself liable for negligence³; or if he possess it in good faith, or have the usufruct in it, or some other right, so that he is interested in its not being carried off; it must be ruled that he is able to bring this action, not to recover ownership, but to recover that (right) only which can be alleged to have been subtracted from the goods, that is to say from the substance, of him who has suffered robbery⁴.

It may further be laid down as a general principle, that the

¹ All the constitutions referred to in the preceding note are general in their wording; they do not speak exclusively of moveables.

² This paragraph is taken, with some slight verbal alterations, from a passage of Ulpian *ad Edict.* in D. 47. 8. 2. 22.

³ See note on III. 25. 9.

⁴ In case of theft the *actio furti* can be brought by any person interested, but the *condictio* (or *vindi-*

catio furtiva by the owner alone; IV. 1. 13—19. The difficulty in the present case is that the *actio vi bonorum raptorum* is partly penal and partly condictive. The solution seems to be that any person interested can bring the action, and keep for himself three-fourths of the damages awarded, retaining such right over the other fourth as he had over the article removed by force.

furti actio competit in re clam facta, ex hisdem causis omnes habere hanc actionem.

TIT. III. DE LEGE AQUILIA.

Damni iniuriæ actio constituitur per legem Aquiliam, cuius primo capite cautum est, ut si quis hominem alienum, alienamve quadrupedem quæ pecudum numero sit, iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur. (1.) Quod autem non præcise de quadrupede, sed de ea tantum quæ pecudum numero est cavetur, eo pertinet, ut neque de feris bestiis neque de canibus cautum esse intellegamus, sed de his tantum quæ proprie pasci dicuntur, quales sunt equi muli asini boves oves caprae. de suis quoque idem placuit: nam et sues pecudum appellatione continentur, quia et hi gregatim pascuntur: sic denique et Homerus in *Odyssea*¹ ait, sicut Aelius Marcianus in suis institutionibus refert:

same reasons which will enable the action of theft to be brought in respect of a secret transaction, will enable any person to resort to this action (if the removal be with violence).

TIT. III. ON THE AQUILIAN LAW.

The action *damni iniuriæ* (of damage done wrongfully) was introduced by the Lex Aquilia, in the first section of which it is laid down that if any one have wrongfully slain another person's slave or a quadruped included in the category of cattle, he shall be condemned to pay to the owner the highest value the thing has borne within that year. 1. The mention, not of quadrupeds simply, but of such quadrupeds only as are included in the category of cattle, implies that we are not to understand the provision to refer to wild beasts, or to dogs, but only to those animals which are properly said "to pasture," such as horses, mules, asses, oxen, sheep, goats. The same definition also applies to swine, for swine are included in the term "cattle," because they pasture in herds. And so in fact Homer expresses it in the *Odyssey*¹, as Aelius Marcianus in his Institutes quotes:

¹ *Od.* XIII. 407, 408.

Δήεις τὸν γε σύεσσι παρήμενον· αἱ δὲ νέμονται
Πὰρ Κόρακος πέτρῃ, ἐπὶ τε κρήνῃ Ἀρεθούσῃ.

(2.) Iniuria autem occidere intellegitur qui nullo iure occidit. itaque latronem qui occidit non tenetur, utique si aliter periculum effugere non potest. (3.) Ac ne is quidem hac lege tenetur qui casu occidit, si modo culpa eius nulla inveniatur: nam alioquin non minus ex dolo quam ex culpa quisque hac lege tenetur¹. (4.) Itaque si quis, dum iaculis ludit vel exercitatur, transeuntem servum tuum traiecerit, distinguitur. nam si id a milite quidem in campo, eoque ubi solitum est exercitari, admissum est, nulla culpa eius intellegitur; si alius tale quid admiserit, culpa reus est². idem iuris est et de milite, si in alio loco quam qui exercitandis militibus destinatus est id admisit. (5.) Item si putator ex arbore deiecto ramo servum tuum transeuntem occiderit³, si prope viam publicam aut vicina-

“Him will you find
Seated beside his swine, whose pasture-ground
Is close by Korax’ rock and near the fount
Of Arethusa.”

2. Now a man is considered to kill wrongfully who kills without right. Therefore one who kills a highwayman is not under liability, at any rate if he could not escape peril otherwise. 3. Nor is any man liable under this law who causes death by accident, provided only no negligence be imputable to him; for otherwise a man is chargeable under this law for negligence just as much as for malice¹. 4. If, therefore, a person in the course of a game or practice with javelins have killed your slave as he passed by, a distinction is drawn; for when the act has been committed by a soldier in the camp or in a place where practising usually goes on, no negligence is attributable to him; but if any other person have done the like, he is guilty of negligence². The same view must be taken of a soldier, when he committed the act in any other place except one set apart for military training. 5. So also if one in pruning trees have thrown down a branch and killed your slave as he passed³; if

¹ Gaius III. 211. The wrongdoer is liable not only for *culpa lata* but also for *culpa levis*: see D. 9. 2. 44.

² D. 9. 2. 9. 4: D. 9. 2. 10.

³ D. 9. 2. 31: D. 48. 8. 8. 7.

lem¹ id factum est, neque praeclamavit, ut casus evitari possit, culpa reus est; si praeclamavit, neque ille curavit cavere, extra culpam est putator. aequè extra culpam esse intellegitur, si seorsum a via forte vel in medio fundo caedebat, licet non praeclamavit, quia eo loco nulli extraneo ius fuerat versandi. (6.) Praeterea si medicus qui servum tuum secuit dereliquerit curationem, atque ob id mortuus fuerit servus, culpa reus est². (7.) Imperitia quoque culpa annumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit³. (8.) Impetu quoque mularum quas mulio propter imperitiam retinere non potuerit, si servus tuus oppressus fuerit, culpa reus est mulio. sed et si propter infirmitatem retinere eas non potuerit, cum alius firmior retinere potuisset, aequè culpa tenetur. eadem placuerunt de eo quoque qui cum equo veheretur impetum eius aut propter

this occurred near a public road or an occupation road¹, and he did not call out so that the fall might be avoided, he is guilty of negligence: if he did call out and the passer-by took no pains to guard himself, he is free from negligence. Equally free from blame will a man be considered when he happened to be lopping boughs at a distance from the road or in the middle of a field, even though he gave no warning, because no stranger had any right to be upon the spot. 6. Again, when a physician after performing an operation on your slave has neglected to attend him, and in consequence the slave has died, the physician is guilty of negligence². 7. Want of skill too is held to be equivalent to negligence, as, for instance, when a physician has caused the death of your slave by operating on him unskilfully or by giving him a wrong medicine³. 8. So too if your slave has been knocked down by the violence of mules which their driver could not hold in hand for want of skill, the driver is liable for negligence. And even if he was not able to hold them in through want of strength, he will be equally liable, supposing a stronger man could have held them in. The authorities held the same doctrine in the case of one who owing either to want of strength or want of skill was unable to

¹ "Viae vicinales, quae ex agris privatorum collatis factae sunt," D. 43. 7. 3. "Vicinales sunt viae quae in vicis sunt, vel quae in vicos

ducunt," D. 43. 8. 2. 22.

² D. 9. 2. 8. pr.

³ D. 1. 18. 6. 7.

infirmatatem aut propter imperitiam suam retinere non potuerit. (9.) His autem verbis legis, quanti in eo anno plurimi fuerit, illa sententia exprimitur¹, ut si quis hominem tuum qui hodie claudus aut luscus aut mancus erit occiderit, qui in eo anno integer aut pretiosus fuerit, non tanti teneatur quanti is hodie erit, sed quanti in eo anno plurimi fuerit. qua ratione creditum est² poenalem esse huius legis actionem, quia non solum tanti quisque obligatur quantum damni dederit, sed aliquando longe pluris: ideoque constat in heredem eam actionem non transire³, quae transitura fuisset, si ultra damnum numquam lis aestimaretur. (10.) Illud non ex verbis legis, sed ex interpretatione placuit, non solum perempti corporis aestimationem habendam esse, secundum ea quae diximus, sed eo amplius quicquid praeterea perempto eo corpore damni vobis allatum fuerit⁴, veluti si servum tuum heredem ab aliquo insti-

restrain the violence of the horse on which he was riding. 9. Now the meaning conveyed by those words in the law, "of the highest value in that year," is as follows¹: suppose a person has slain a slave of yours who was at the time lame, or blind of an eye, or maimed in limb, although during the year he had been sound or valuable, the liability of the slayer is measured, not by the slave's value at the time of death, but by his highest value during the year; and on this ground it has been supposed² that the action founded upon this law is a penal one, inasmuch as an offender is liable not only to the extent of the actual damage done, but sometimes far beyond it; and hence it is ruled that the action does not continue against his heir³, as would have been the case if the amount recoverable had not exceeded the damage done. 10. The following decision depends not on the wording of the law, but on its construction, viz. that the value to be estimated is not only that of the object destroyed, according to the principles above laid down, but that of any damage besides which has been inflicted on you through the destruction of the object⁴; as, for example,

¹ D. 9. 2. 21: Gaius III. 214.

² Justinian speaks doubtfully, because the action was not of necessity penal; it was merely capable of proving penal. See IV. 6. 19.

³ In accordance with the general

principle: "Ex maleficio poenales actiones in heredem non competere." See IV. 12. 1; also D. 9. 2. 23. 8; D. 47. 1. 1. pr.

⁴ Gaius III. 212.

tutum antea quis occiderit, quam is iussu tuo adiret: nam hereditatis quoque amissae rationem esse habendam constat. item si ex pari mularum unam vel ex quadriga equorum unum occiderit, vel ex comoedis unus servus fuerit occisus: non solum occisi fit aestimatio, sed eo amplius id quoque computatur quanto depretiati sunt qui supersunt. (11.) Liberum est autem ei cuius servus fuerit occisus et privato iudicio legis Aquiliae damnum persequi, et capitalis criminis eum reum facere¹.

12. Caput secundum legis Aquiliae in usu non est².

13. Capite tertio de omni cetero damno cavetur³. Itaque si quis servum vel eam quadrupedem quae pecudum numero est vulneravit, sive eam quadrupedem quae pecudum numero non est, veluti canem aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituitur. in ceteris quoque omnibus animalibus, item in omnibus rebus quae anima carent,

when a man has slain your slave, who had been instituted heir to some person, prior to his entering on the inheritance by your direction: for it is admitted that account must further be taken of the value of the lost inheritance. So too if a person have slain one of a pair of mules, or one of a team of horses, or one of a band of slave comedians, the estimate of damage is not confined to the specific object destroyed, but the depreciation in value of the surviving objects is also taken into account. 11. A man whose slave has been killed may both sue for the damage by the private action under the Aquilian law and also indict the offender for a capital crime¹.

12. The second section of the Aquilian law is not now in use².

13. In the third section provision is made regarding all other damage³. Therefore if any one have wounded a slave or a quadruped included in the category of cattle, or either killed or wounded a quadruped not included in that category, as a dog or a wild beast, the action is founded on this section. And with respect to all other animals, as well as with respect to

¹ Sc. under the Lex Cornelia de Sicariis; see D. 9. 2. 23. 9, and C. 3.

² 3.

³ As to its contents see Gaius III.

215, 216.

³ Gaius III. 217. The words of the third section are quoted in D. 9. 2. 27. 5.

damnum iniuria datum hac parte vindicatur. si quid enim ustum aut ruptum aut fractum fuerit, actio ex hoc capite constituitur; quamquam potuerit sola rupti appellatio in omnes istas causas sufficere; ruptum enim intellegitur quod quoquo modo corruptum est. unde non solum usta aut fracta, sed etiam scissa et collisa et effusa et quoquo modo perempta atque deteriora facta hoc verbo continentur; denique responsum est, si quis in alienum vinum aut oleum id immiserit quo naturalis bonitas vini vel olei corrumperetur, ex hac parte legis eum teneri. (14.) Illud palam est, sicut ex primo capite ita demum quisque tenetur, si dolo aut culpa eius homo aut quadrupes occisus occisave fuerit, ita ex hoc capite, ex dolo aut culpa, de cetero damno quemque teneri. Hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit, obligatur is qui damnum dederit. (15.) Ac ne plurimi quidem verbum adliicitur. sed Sabino recte placuit perinde habendam aestimationem, acsi etiam hac parte plurimi

things devoid of life, damage done wrongfully is redressed under this section. For if anything be burnt, or broken, or shattered, the action is founded on this section: although the word "broken" (*ruptum*) would by itself have met all these cases, for by *ruptum* is understood that which is spoiled in any way. Hence not only things burnt, or shattered, but also things torn, and bruised, and spilled, and in any way destroyed and deteriorated, are comprised in this word; and in fine it has been authoritatively laid down that if a person have introduced into the wine or oil belonging to another something whereby the natural good quality of the wine or oil is injuriously affected, he is liable under this section of the law. 14. It is clear that in like manner as a person is liable under the first section, only when a slave or a quadruped has been killed through his malice or negligence, so under the present section a person is liable for all other damage, if it proceed from malice or negligence. Under this section, however, the wrongdoer is responsible not for the value of the object during that year, but during the thirty days immediately preceding the injury. 15. And even the word *plurimi* (the highest value) is not added; but Sabinus correctly decided that the damages must be assessed upon the assumption that the word *plurimi* has been inserted in this section also, for (he held) that the

verbum adiectum fuisset : nam plebem Romanam quae Aquilio tribuno rogante hanc legem¹ tulit contentam fuisse, quod prima parte eo verbo usa est². (16.) Ceterum placuit ita demum ex hac lege actionem esse, si quis praecipue³ corpore suo damnum dederit. ideoque in eum qui alio modo damnum dederit utiles actiones⁴ dari solent: veluti si quis hominem alienum aut pecus ita incluserit ut fame necaretur, aut iumentum tam vehementer egerit ut rumperetur, aut pecus in tantum exagitaverit ut praecipitaretur⁵; aut si quis alieno servo persuaserit, ut in arborem ascenderet, vel in puteum descenderet, et is ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis laesus, utilis in eum actio datur. sed si quis alienum servum de ponte aut ripa in flumen deiecerit et is suffocatus fuerit eo quod pro-

Roman plebeians who sanctioned this law on its proposal by the tribune Aquilius¹ thought it sufficient to have expressed the word in the first portion of the law². 16. But it has been decided that an action lies under this law only when a man has beyond all doubt³ done damage by means of his own person; therefore *utiles actiones*⁴ are usually granted against the individual who has done damage in any other way; for instance, if a man has shut up the slave or flock belonging to another person so as to cause death by hunger, or has so violently driven a beast of burden as to cause injury, or has so overdriven a flock as to cause them to trample each other under foot⁵, or if a man has persuaded another person's slave to get up a tree or go down a well, and in the ascent or descent the slave has been killed or injured in some part of his body, in all these cases an *utilis actio* is granted against him. But if a man has pushed another person's slave from a bridge or a bank into a stream and the slave has been drowned

¹ The date of the Lex Aquilia is not known, but it was in force long before Cicero's time, as we see from *pro Tull.* 9. It is referred by Theophilus to the time of the secession to the Janiculan mount, i.e. B.C. 286.

² See the same rule applied to the construction of legacies, D. 31. 1. 77. 22: and for the general maxim on this method of interpretation see D.

45. 1. 134. 1.

³ "Praecipue; ita ut dubitari nequeat." Schrader.

⁴ The nature of these actions is discussed in our edition of Gaius. See particularly a note on Gaius II. 78, and App. (Q.) to our edition of that author.

⁵ From D. 9. 2. 53 we gather that this is the meaning of *praecipitari* or *dejici*.

iecerit, corpore suo damnum dedisse non difficiliter intellegi poterit: ideoque ipsa lege Aquilia tenetur¹. Sed si non corpore damnum fuerit datum, neque corpus laesum fuerit, sed alio modo damnum alicui contigerit, cum non sufficit neque directa neque utilis Aquilia, placuit eum qui obnoxius fuerit in factum actione teneri²: veluti si quis misericordia ductus alienum servum compeditum solverit, ut fugeret³.

TIT. IV. DE INIURIIS.

Generaliter iniuria dicitur omne quod non iure fit: specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ὑβρις appellant, alias culpa, quam Graeci ἀδίκημα dicunt, sicut in lege Aquilia damnum iniuria accipitur, alias iniquitas et iniustitia, quam Graeci ἀδικίαν vocant. cum enim Praetor vel

in consequence of having been pushed in, it is not difficult to see that he caused the damage with his person, and therefore he is liable under the Aquilian law itself¹. But if the damage has not been done by the actual person of the wrongdoer, nor the actual person of the injured object been hurt, but the damage has happened to something in some other way, inasmuch as neither the direct Aquilian action nor an *utilis actio* applies, it has been held that he who has been in fault is liable to an action upon the case², as for instance where a man moved by a feeling of compassion has set free another person's slave from his fetters and given him an opportunity of escaping³.

TIT. IV. ON INJURIES.

"Injury" in its general sense denotes everything that is done contrary to law; in a special sense it means sometimes contumely, which is derived from the verb *contemnere*, and is by the Greeks called ὑβρις; at other times culpability, which the Greeks style ἀδίκημα, and thus the damage "done with injury" is understood in the Aquilian law; at other times again it denotes want of equity and of justice, ἀδικία as the Greeks

¹ Gaius III. 219.² An *actio in factum praescriptis verbis* is meant: as to which see

IV. 6. 28, and App. (Q) to our edition of Gaius.

³ D. 4. 3. 7. 7.

iudex non iure contra quem pronuntiat¹, iniuriam accepisse dicitur. (1.) Iniuria² autem committitur non solum, cum quis pugno puta aut fustibus caesus vel etiam verberatus erit, sed etiam si cui convicium³ factum fuerit, sive cuius bona quasi debitoris possessa fuerint⁴ ab eo qui intellegebat nihil eum sibi debere, vel si quis ad infamiam alicuius libellum aut carmen scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, sive quis matrem-familias aut praetextatum⁵ praetextatamve assectatus fuerit, sive cuius pudicitia attentata esse dicetur; et denique aliis pluribus modis admitti iniuriam mani-

call it. For when a Praetor or a *judex* decides¹ against any one contrary to law, the person is said to suffer an injury.

1. Injury is committed² not only when a man is struck with the fist, or beaten with a stick or lashed, but also when abusive language³ is publicly addressed to any one, or when the goods of any one have been taken⁴ as though he were a debtor by a person who knew that he owed him nothing, or when some one has written, composed or published a pamphlet or a copy of verses, to the discredit of another, or has maliciously procured the doing of some one of these acts, or has followed about a married woman or a young boy or girl⁵, or when some person's modesty is said to have been assailed; and in fact it

¹ During the prevalence of the formulary system the *judex* usually pronounced sentence; but at that time also there were many *judicia extraordinaria* in which the Praetor acted without calling in the aid of a *judex*: besides which even in a *judicium ordinarium* the Praetor had *jus pronuntiandi* in the sense of allowing or refusing an action or an exception.

² Gaius III. 220. The definition of *iniuria* given by Paulus is: "injuriam patimur aut in corpus aut extra corpus: in corpus verberibus et illatione stupri: extra corpus conviciis et famosus libellis." *S. R.* V. 4. 1. So also Auctor ad Herennium, IV. 25; "injuriae sunt quae aut pulsatione corpus, aut convicio aures, aut aliqua turpitudine vitam cuiuspiam violant." See further, D.

47. 10. 1. 1 and 2.

³ An explanation of the word *convicium* is given by Ulpian in D. 47. 10. 15. 4: "Convicium autem dicitur vel a concitatione vel a conventu, hoc est a collatione vocum, quum enim in unum complures voces conferuntur, convicium appellatur, quasi convocium." Hence we see that *convicium* means either abusive language addressed to a man publicly, or the act of inciting a crowd to beset a man's house or to mob the man himself.

⁴ Sc. when the pretended creditor obtains an order from the Praetor to take possession of the property and advertise it for sale.

⁵ *Praetextatus* signifies "under the age of puberty:" for at fourteen the *toga virilis* was assumed and the *toga praetextata* discarded.

festum est. (2.) Patitur autem quis iniuriam non solum per semetipsum, sed etiam per liberos suos quos in potestate habet; item per uxorem suam, id enim magis praevaluit. itaque si filiae alicuius quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum iniuriarum agi potest, sed etiam patris quoque et mariti nomine¹. contra autem, si viro iniuria facta sit, uxor iniuriarum agere non potest: defendi enim uxores a viris, non viros ab uxoribus, aequum est², sed et socer nurus nomine cuius vir in potestate est iniuriarum agere potest. (3.) Servis autem ipsis quidem nulla iniuria fieri intellegitur, sed domino per eos fieri videtur³: non tamen iisdem modis quibus etiam per liberos et uxores, sed ita, cum quid atrocius commissum fuerit, et quod aperte ad contumeliam domini respicit⁴, veluti si quis alienum servum verberaverit; et in hunc

is clear that injury is committed in many other ways. 2. A man suffers injury not only in his own person, but even in that of his descendants who are under his *potestas*, as also in that of his wife, for this has become the prevalent opinion. If then you do an injury to some one's daughter who is married to Titius, not only can an action for injury be brought against you in the daughter's name, but also another in that of the father and a third in that of the husband¹. On the other hand, when the injury has been done to the husband, the wife cannot bring an action for injury, for it is right for wives to be defended by their husbands, not husbands by their wives². Moreover, a father-in-law can bring an action for injury in the name of his daughter-in-law when her husband is under *potestas*. 3. It is considered that no injury can be done to slaves as such, but the act is regarded as affecting their masters through them³; not, however, under the same circumstances as through children and wives, but only when some atrocious act is committed and one that seems clearly to be intended for an insult to the master⁴, as when a man has flogged another's

¹ Gaius III. 221. We are not to understand that a woman under *potestas* could herself bring an action. The father would be the plaintiff, but could sue either for injury done to his daughter or to himself, *filiae*

nomine or *suo nomine*. So of the husband.

² D. 47. 10. 2.

³ Gaius III. 222.

⁴ There is some doubt whether the injury must be both atrocious

casum actio proponitur. at si quis servo convicium fecerit vel pugno eum percusserit, nulla in eum actio domino competit. (4.) si communi servo iniuria facta sit, aequum est non pro ea parte qua dominus quisque est aestimationem iniuriæ fieri, sed ex dominorum persona, quia ipsis fit iniuria¹. (5.) quodsi ususfructus in servo Titii est, proprietas Maevii est, magis Maevio iniuria fieri intellegitur². (6.) sed si libero qui tibi bona fide servit iniuria facta sit, nulla tibi actio dabitur, sed suo nomine is experiri poterit; nisi in contumeliam tuam pulsatus sit, tunc enim competit et tibi iniuriarum actio³. idem ergo est et in servo alieno bona fide tibi serviente, ut totiens admittatur

slave; and an action is provided to meet the case. But if a man have used abusive language to a slave in public or struck him with his fist, no action can be brought against him by the master. 4. Where an injury has been done to a slave who is the common property of two or more masters, it is right that the estimate of damage for the injury be made not in proportion to the particular share that each master has in him, but with reference to the social position of the masters, because the injury is done to them¹. 5. Where, however, the usufruct in the slave belongs to Titius and the property to Maevius, the injury is assumed to affect Maevius rather (than Titius)². 6. But where the injury has been done to a freeman who is serving you in good faith as a slave, no right of action will be given to you, but the freeman can sue in his own name, unless he has been beaten for the express purpose of insulting you, for in that event a right of action for injury belongs to you³. The same rule of course holds in the case of a slave belonging to another and being bona fide in your service, so that the action

and specially intended to insult the master, in order to give the latter a right of action; but the words of the edict, quoted in D. 47. 10. 15. 34, would lead us to conclude that the conditions are separate rather than conjoint.

¹ If the action were brought *nomine servi*, i. e. for actual damage done to the slave, the award would be divided rateably: see D. 47. 10.

16. It is only when the action of the master is *nomine suo*, i. e. for the personal injury to himself through the slave, that the principle of our present text applies.

² D. 47. 10. 15. 47. But it was otherwise of course if a design to insult the usufructuary could be proved: in fact he is now speaking only of the action *nomine servi*.

³ D. 47. 10. 15. 48.

iniuriarum actio, quotiens in tuam contumeliam iniuria ei facta sit.

7. Poena autem iniuriarum ex lege duodecim tabularum propter membrum quidem ruptum talio erat; propter ossum vero fractum nummariae poenae erant constitutae, quasi in magna veterum paupertate¹. Sed postea Praetores permittebant ipsis qui iniuriam passi sunt eam aestimare; ut iudex vel tanti condemnet quanti iniuriam passus aestimaverit, vel minoris, prout ei visum fuerit. Sed poena quidem iniuriae quae ex lege duodecim tabularum introducta est in desuetudinem abiit: quam autem Praetores introduxerunt, quae etiam honoraria appellatur, in iudiciis frequentatur. nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae: qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus² homine, aliud in vilissimo vel compedito constituatur. (8.) Sed

for injury may be allowed to you in case the injury has been done with the object of insulting you.

7. By a law of the Twelve Tables the penalty for injury was like for like in the case of a limb destroyed; but for a broken bone money penalties were imposed proportioned to the extreme poverty of the ancients¹. Afterwards, however, the Praetors allowed those who suffered an injury to estimate its amount themselves, so that the *iudex* either imposes on the defendant the sum at which the injured party puts his damage, or a smaller sum, according to his own discretion. But the penalty for injury appointed by the Twelve Tables has fallen into disuse, and that which the Praetors introduced, termed Honorary, is resorted to in suits, for the estimate of the injury is enlarged or diminished in proportion to the dignity and respectability of the injured party; and this scale of compensation is, not improperly, observed even in the case of an individual in a servile position; so that the amount varies according as the sufferer is a slave-steward, or in a position of inferior trust², or utterly degraded and kept in

¹ Gaius III. 223.

² *Actus* is equivalent to *adminis-*

tratio, especially when slaves are spoken of. See Brissonius *sub verb.*

et lex Cornelia¹ de iniuriis loquitur et iniuriarum actionem introduxit. quae competit ob eam rem, quod se pulsatum quis verberatumve, domumve suam vi introitum esse dicat. domum autem accipimus, sive in propria domo quis habitat, sive in conducta, vel gratis, sive hospitio receptus sit².

9. Atrox iniuria aestimatur³ vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus caesus; vel ex loco, veluti si cui in theatro vel in foro vel in conspectu Praetoris iniuria facta sit; vel ex persona, veluti si magistratus iniuriam passus fuerit, vel si senatori ab humili iniuria facta sit, aut parenti patronoque fiat a liberis vel libertis (aliter enim senatoris et parentis patronique, aliter extranei et humilis personae iniuria aestimatur); nonnumquam et locus vulneris atrocem iniuriam facit, veluti si in oculo quis percussus sit⁴. parvi autem refert,

fetters. 8. Moreover the Lex Cornelia¹ speaks of injuries, and introduced an action for injuries, which can be resorted to in cases where a man asserts that he has been beaten or lashed, or that his house has been forcibly entered. Now by the word "house" we understand either a man's own house which he occupies, or a house which he has hired, or one in which he has been received gratuitously or as a guest².

9. An injury is considered 'atrocious'³ either from the character of the act, as where a man is wounded by another or beaten with sticks; or from the nature of the place, as where the injury is done in a theatre or a forum or in sight of the Praetor; or from the status of the individual, as where a magistrate has suffered an injury, or where one has been done to a senator by a man of low rank, or to an ascendant or a patron by descendants or freedmen (for the estimate of the injury in the case of a senator, a descendant and a patron is different from that in the case of a stranger and a man of low rank); sometimes too the situation of the wound makes the injury atrocious, as where a man has been struck in the eye⁴; and it is unimportant whether

¹ Lex Cornelia de Sicariis. D. 47. 10. 5. pr.

² He must intend something more than a mere visit. "Caeterum lex ad hos pertinebit qui inhabitant non

momenti causa, licet ibi domicilium non habent." D. 47. 10. 5. 5.

³ Gaius III. 225.

⁴ D. 47. 10. 8.

utrum patrifamilias, an filiofamilias talis iniuria facta sit¹: nam et haec atrox aestimabitur².

10. In summa sciendum est, de omni iniuria eum qui passus est posse vel criminaliter agere, vel civiliter³. et si quidem civiliter agatur, aestimatione facta, secundum quod dictum est, poena imponitur. sin autem criminaliter, officio iudicis extraordinaria poena reo irrogatur: hoc videlicet observando, quod Zenoniana constitutio⁴ introduxit, ut viri illustres, quique supra eos sunt, et per procuratorem possint actionem iniuriarum criminaliter vel persequi vel suscipere, secundum eius tenorem qui ex ipsa manifestius apparebit.

11. Non solum autem is iniuriarum tenetur qui fecit iniu-

such injury has been done to a *paterfamilias* or a *filiusfamilias*¹, for even the latter is a case of atrocious injury².

10. Finally it should be noted that with reference to every injury the injured party can proceed either criminally or civilly³. If he prefer the civil action a penalty is imposed according to the estimate of the damage consistently with the rules above stated. If he resort to his criminal remedy an extraordinary penalty is set upon the defendant by the judge in virtue of his office. We must, however, bear in mind the rule introduced by a constitution of Zeno⁴, that men of the dignity of *illustres* and all superior to them may prosecute or defend the criminal action for injury by means of an agent as well (as personally), in accordance with the tenor of the constitution, as will appear more clearly on reference to it.

11. Not only is that person liable to an action for injury

¹ D. 47. 10. 9. 2.

² Not only were the penalties higher in the case of *iniuria atrox*; but the *actio iniuriarum* was allowed to emancipated children against their parent, or to freedmen against their patron, when the injury was of this aggravated kind, although it would be refused in the case of *iniuria levis*: see D. 47. 10. 7. 2: D. 2. 4. 10. 12: D. 48. 5. 38. 9. In earlier times there was the further distinction that the Praetor assessed the damages for *iniuria atrox*, and the plaintiff for *iniuria levis*: see Gaius III. 224.

It is to be noted that a child not emancipated could never sue his parent for *iniuria*, whether *levis* or *atrox*.

³ We see from D. 47. 10. 7. 6 that this had not always been the case; *iniuria atrox* having once been a ground for criminal proceedings only, and *iniuria levis* for a civil action alone.

⁴ C. 9. 35. 11. As to *illustres* see note on I. 20. 4: *patricii* and *consulares* were of higher rank. A procurator was not as a rule allowed in criminal suits. D. 48. 1. 13. 1.

riam, hoc est qui percussit; verum ille quoque continebitur qui dolo fecit, vel qui curavit, ut cui mala pugno percuteretur¹. (12.) Haec actio dissimulatione aboletur: et ideo si quis iniuriam dereliquerit, hoc est statim passus ad animum suum non revocaverit, postea ex poenitentia remissam iniuriam non poterit recolere².

TIT. V. DE OBLIGATIONIBUS QUAE QUASI EX DELICTO
NASCUNTUR.

Si iudex litem suam fecerit³, non proprie ex maleficio obligatus videtur. sed [quia neque ex contractu obligatus est, et utique peccasse aliquid intellegitur licet per imprudentiam: ideo

who has committed the injury, for instance the actual striker, but he too through whose fraudulent or wilful act another person's cheek has been smitten¹. 12. This action is barred by the sufferer's condonation; and therefore if he neglect an injury, that is to say, if he do not at the time of its infliction treat it as important, he cannot afterwards by viewing it in a different manner revive the injury which he has remitted².

TIT. V. ON OBLIGATIONS WHICH ARISE FROM
QUASI-DELICT.

If a judge "make a suit his own³," he is not, strictly speaking, bound *ex maleficio*; but since he is also not bound by contract, and yet clearly has committed a fault, albeit through carelessness, it results that he is liable for

¹ D. 47. 10. 11. pr.

² D. 47. 10. 11. 1.

³ A judge is said "to make the suit his own" when his decision is fraudulently and designedly given to evade the provisions of a law. He will be guilty of fraud if he be proved to have acted from favour, enmity or mercenary motives; and will have to pay the full value of the matter in dispute. D. 5. 1. 15. 1. The phrase is found in Cic. *de*

Orat. 11. 75: "Quid si, quum pro altero dicas, litem suam facias." From the passage in the text, as well as from Gaius IV. 52, it appears that a judge was also liable for a wrong decision given through simple ignorance, without taint of fraud; but it is to be remembered that skilled jurisconsults were appointed to advise the judges; as we see from D. 1. 22, &c.

videtur] quasi ex maleficio teneri, et in quantum de ea re aequum religioni iudicantis videbitur poenam¹ sustinebit. (1.) Item is ex cuius coenaculo, vel proprio ipsius vel conducto vel in quo gratis habitabat, deiectum effusumve aliquid est, ita ut alicui noceretur, quasi ex maleficio obligatus intellegitur²: ideo autem non proprie ex maleficio obligatus intellegitur, quia plerumque ob alterius culpam tenetur, aut servi aut liberi. Cui similis est is qui ea parte qua vulgo iter fieri solet id positum aut suspensum habet, quod potest si ceciderit alicui nocere: quo casu poena decem aureorum constituta est³. De eo vero quod deiectum effusumve est dupli, quanti damnum datum sit, constituta est actio⁴. Ob hominem vero liberum occisum quinquaginta aureorum poena constituitur; si vero vivet nocitumque ei esse dicetur, quantum ob eam rem aequum iudici videtur,

a quasi-delict, and will be subject to such penalty¹ as appears equitable to the conscience of him who adjudicates on the matter. 1. So too a man from whose chamber (whether his own, or a hired one or one in which he was dwelling rent-free) anything has been thrown or poured out in such wise as to hurt some person, is considered to be liable for a quasi-delict²: for he cannot strictly speaking be assumed to be liable for delict, because in most cases he is responsible for the misdeed of some one else either slave or free. In the same category is any individual who has something so placed or suspended over a path which the public use, that if it fall it may hurt somebody: for which last-named case a penalty of ten *aurei* is imposed³. But in the event of the article actually falling or being poured out, an action is allowed for double the amount of the damage done⁴. For the death of a free man the established penalty is fifty *aurei*; if however he survives, and it is shown that he has received hurt, there is a right of action for

¹ He is only liable to make good the loss he has occasioned, so that *poena* is not here used in its technical sense. See D. 47. 10. 17. 2.

If he wilfully gave a wrong judgment, the case would be different; and a penalty would be inflicted

over and above the reparation of the injury caused.

² D. 44. 7. 5. 5.

³ The words of the Edict are quoted in D. 9. 3. 5. 6.

⁴ See the quotation of this second Edict in D. 9. 3. 1. pr.

actio datur: iudex enim computare debet mercedes medicis praestitas, ceteraque impendia quae in curatione facta sunt, praeterea operarum quibus caruit aut cariturus est ob id quod inutilis factus est. (2.) Si *filiusfamilias* seorsum a patre habitaverit, et quid ex coenaculo eius deiectum effusumve sit, sive quid positum suspensumve habuerit cuius casus periculosus est: Iuliano placuit in patrem nullam esse actionem, sed cum ipso filio agendum. quod et in filiofamilias iudice observandum est qui litem suam fecerit¹. (3.) Item exercitor² navis aut cauponae aut stabuli de dolo aut furto, quod in nave aut in caupona aut in stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicuius eorum quorum opera navem aut cauponam aut stabulum exerceat: cum enim neque ex contractu sit adversus eum constituta haec actio, et aliquatenus culpa reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri

such damages as the judge shall deem reasonable: and herein the judge should include the fees paid to physicians and other expenses incurred in the cure, besides the value of the employment he has already lost, or is likely to lose through being incapacitated. 2. When a *filiusfamilias* lives apart from his father, and from his chamber something has been thrown or poured down, or if he keeps something so placed or suspended that it threatens to fall, Julian held that no action could be brought against the father, but that the proceedings must be against the son himself. And this principle ought to be applied to the case of a *filiusfamilias* judge who has made a suit his own¹. 3. So too the master² of a ship, a tavern or an inn is considered liable *quasi ex maleficio* for any damage or theft which occurs in the ship, tavern or inn, provided the misconduct be not his own but that of some person by whose instrumentality he managed the ship, tavern or inn: for as the action cannot be brought against him on the ground of contract, and yet he is to some extent responsible on account of employing improper servants, therefore it seems that he is liable through his quasi-

¹ D. 44. 7. 5. 5; D. 5. 1. 15. The application of the rule is that the father's liability is limited to the amount of his son's *peculium*.

² Exercitor appellatur is ad quem quotidianus navis quaestus pertinet. IV. 7. 2.

videtur. in his autem casibus in factum actio¹ competit, quae heredi quidem datur, adversus heredem autem non competit.

TIT. VI. DE ACTIONIBUS.

Superest, ut de actionibus loquamur². Actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur³.

1. Omnium actionum quibus inter aliquos apud iudices arbitrosve de quacumque re quaeritur summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo qui ei obligatus est vel ex contractu vel ex maleficio (quo casu proditae⁴ actiones in personam

delict. In these cases the action which can be brought, is one *in factum*¹; and it is allowed for the benefit of the heir of the injured person, but not against the heir of the defendant.

TIT. VI. CONCERNING ACTIONS.

It remains for us to speak of actions². Now an action is nothing else than the power of suing in court for anything that is due to us³.

1. The primary arrangement of all actions whereby an issue is raised between parties before judges or arbiters in respect of any matter is into two chief divisions; i. e. they are either *in rem* or *in personam*. For every plaintiff either sues a person who is bound to him by reason of contract or delict (in which case the actions provided⁴ are *in personam*, and in them the

¹ Sc. *in factum praescriptis verbis*: see App. O: cf. also D. 4. 9. 7. 1, D. 4. 9. 7. 6.

² On the classification and characteristics of actions see App. O.

³ This definition is extracted from Celsus: see D. 44. 7. 51.

⁴ *Jus* here = *facultas*. So conversely *facultas agendi* stands for *actio* in D. 36. 1. 1. 4.

Judicium in Celsus' time was opposed to *jus*, the former word denoting the process before a *judex*, *arbiter* or *recuperator*, the latter

word meaning the preliminary proceedings before the Praetor. But Justinian no doubt intended by *judicium* the remedy by recourse to law as contradistinguished from self-redress or self-defence; though there is a lingering reminiscence of the old conception in the words "apud iudices arbitrosve" in the next paragraph.

⁴ *Proditae* is a technical word frequently conjoined with *actio*. Forms of action were drawn up, *proditae*, *propositae*, in the Praetor's edict.

sunt, per quas intendit adversarium¹ ei dare facere oportere, et aliis quibusdam modis²); aut cum eo agit qui nullo iure ei obligatus est, movet tamen alicui de aliqua re controversiam³. Quo casu proditae actiones in rem sunt. Veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, et possessor dominum se esse dicat: nam si Titius suam esse intendat, in rem actio est. (2.) Aequè si agat ius sibi esse de fundo forte vel aedibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio est. eiusdem generis est actio de iure praediorum urbanorum, veluti si agat ius sibi esse altius aedes suas tollendi, prospiciendive, vel proiciendi aliquid vel immittendi in vicini aedes. contra⁴ quoque de usufructu et de servitutibus praediorum rusticorum, item

plaintiff declares¹ that his adversary ought to give him something or do for him something, or makes declaration in certain other ways²), or else he sues one who is not bound to him by any personal obligation, and yet wages his suit against him in respect of something³. In this latter case the actions provided are *in rem*. For instance, where a person possesses some corporeal thing which Titius asserts to belong to him, whilst its possessor maintains that he is the owner, here if Titius in his action declares that it is his, the action is *in rem*. 2. Similarly, if he declares in his action that he has a right of usufruct over a plot of land or a house, or the right of footway or carriageway over a neighbour's land, or of bringing water from a neighbour's land, the action is *in rem*. Of the same character is the action relating to an urban servitude, as, for instance, where a person maintains that he has a right of raising his house higher, or a right of prospect, or a right of causing something to overhang his neighbour's house or of inserting a beam into it. Contrary actions⁴ are also provided in respect of

¹ *Intendit*=*in intentione ponit*: for although the formulary system of pleading was obsolete when the Institutes were published, many of its technical terms were still employed in modified meanings. The formulary system was in force in the days of Gaius, and a full account of it will be found in his Commentaries

IV. 39—52.

² This statement may be best illustrated by a reference to III. 29. 2, where the various grounds of obligation are combined in a single terse sentence.

³ Gaius IV. 87.

⁴ *Contra* must be translated in close connection with *actiones*, and

praediorum urbanorum invicem quoque proditae sunt actiones, ut si quis intendat ius non esse adversario utendi fruendi, eundi agendi, aquamve ducendi, item altius tollendi, prospiciendi, proiiciendi, immittendi, istae quoque actiones in rem sunt, sed negativae. quod genus actionis in controversiis rerum corporalium proditum non est¹: nam in his agit qui non possidet; ei vero qui possidet non est actio prodita per quam neget rem auctoris² esse. sane uno casu qui possidet nihilo-

usufruct and the servitudes attaching to rustic as well as urban estates; so that when a person declares that his adversary has not the right of usufruct, or of footway or carriageway, or of conducting water, or again of building higher, of prospect, projection or immission, these actions too are *in rem*, but are negative. But this mode of procedure is not resorted to in suits affecting corporeal things¹: for in these the non-possessor is the plaintiff, whereas no action is provided on behalf of the possessor whereby he may deny that the thing in dispute is his opponent's². In fact there is but one case in which a person, although in

invicem treated as redundant. The *actio contraria* is defined in D. 8. 5. 8. pr., "*actio contraria, hoc est juri tibi non esse me cogere.*"

¹ Corporeal things are the only things in the natural sense: incorporeal things are, strictly speaking, rights to or over things. See II. 2. 1, and note thereon.

² The word *auctor* is used to denote a defendant in several well-known passages, e.g. in Cicero's oration *pro Caecina*, 19, "*actio est in auctorem praesentem*;" and in Valerius Probus, 24 (whence Gaius IV. 15 is conjecturally filled up), "*quando in jure te conspicio, postulo anne fias auctor qua de re nexum mecum fecisti.*" So also in D. 21. 2. 4. pr. the fidejussor supplied by a vendor to guarantee the purchaser against eviction is styled *auctor secundus*. The derivation of this appellation is obviously to be traced from the fact that in the old *legis actio per sacramentum* the de-

fendant had to give consent to the performance of the initial formalities (*auctor fieri*), his refusal being equivalent to an admission of the plaintiff's claim. Hence *auctor fieri* is somewhat analogous to "accepting service."

The reading of many MSS. is *actoris* instead of *auctoris*; one or two have *alterius*, which is adopted by Cujacius: one has *possessoris*, and this meets with the approval of Charondas. But *possessoris* is clearly an explanation inserted by some early commentator: *actoris* will make the passage nonsensical, unless we allow with those who defend the reading that it is equivalent to *acturi*, i.e. "the person about to contest the case," a sense which *actor* does not bear elsewhere: besides *auctoris* is much more likely to have been corrupted by some copyist into *actoris*, than *actoris* into *auctoris*; *alterius* seems like *possessoris* to be a gloss. And so we

minus actoris partes obtinet, sicut in lationibus digestorum libris opportunius apparebit¹.

3. Sed istae quidem actiones quarum mentionem habuimus, et si quae sunt similes, ex legitimis et civilibus causis descendunt². Aliae autem sunt quas Praetor ex sua iurisdictione comparatas habet, tam in rem quam in personam, quas et ipsas

possession of the thing, plays the part of plaintiff, as will more fully be explained in our larger treatise, the Digest¹.

3. But those actions which we have noticed and such as are like them take their origin from statute or common law². Others there are (*in rem* as well as *in personam*) which belong to the Praetor and issue out of his separate jurisdiction. Our explanation of these must be made by examples. Thus he

accept the reading *auctoris*, as admitting of the satisfactory explanation given above.

¹ This is a passage which has given no little trouble to commentators. It is not Justinian's custom to refer vaguely to the Digest, but rather to specify the exact title in which a complete explanation of some knotty point will be found: and he generally gives an outline of the law so far as it is comprehensible to a young student, adding the reference, because (as he often states, and almost invariably implies) the full discussion would be out of place in an elementary treatise. Hence we do not think that the words "sane uno casu" refer to something as yet unmentioned by him, and which he leaves his reader to search for without clue in the wilderness of the Digest; but rather have relation to what has gone before, viz. the statement that the possessor of a thing may be plaintiff in a negatory suit about a servitude connected with the thing; and then the reference to the Digest becomes definite, the previous mention of usufruct and servitudes guiding us to D. 7. 6 and D. 8. 5, "si usus fructus petatur, vel ad alium pertinere negatur," and "si servitus vin-

dicatur, vel ad alium pertinere negetur."

Vinnius approves of the conjecture of Donellus and Wesembecchius, that a negative has dropped out of the text and that we should read "sane *non* uno casu": for he argues that even in the negatory suit the possessor of the thing acts as non-possessor of the servitude, suing that the *quasi*-possession of the servitude (there being of course no true possession of what is incorporeal) may be confirmed to him and merged in his possession of the thing itself: but as the reading *non* rests on very poor authority, viz. on the Codd. Feretti and Charondae, and as there is a doubt whether in the former the word is not *vero*, we prefer the usual version; and are of opinion that it admits of satisfactory explanation by reference to what precedes it.

² *Jus civile* is not unfrequently restricted to non-statutory (and non-praetorian) law, e. g. by Pomponius in D. 1. 2. 2. 5. Justinian, in speaking of obligations, makes a classification similar to that in the text: "Civiles sunt quae aut legibus constitutae aut certe jure civili comprobatae sunt," III. 13. 1.

necessarium est exemplis ostendere. Ecce plerumque ita permittit in rem agere, ut vel actor diceret se quasi usu cepisse quod usu non ceperit, vel ex diverso possessor¹ diceret adversarium suum usu non cepisse quod usu ceperit. (4.) Namque si cui ex iusta causa res aliqua tradita fuerit, veluti ex causa emptionis aut donationis aut dotis aut legatorum, necdum eius rei dominus effectus est, si eius rei casu possessionem amiserit, nullam habet directam² in rem actionem ad eam rem persequendam: quippe ita proditae sunt iure civili actiones, ut quis dominium suum vindicet. sed quia sane durum erat eo casu deficere actionem, inventa est a Praetore actio, in qua dicit is qui possessionem amisit eam rem se usucepisse et ita vindicat³ suam esse. quae actio Publiciana appellatur, quoniam primum

frequently allows a suit *in rem* to be so brought that a plaintiff declares that he has gained a quasi-usucaptive title to something wherein he has in fact no usucaption, or that a former possessor¹ declares that his opponent has not acquired a usucaptive title in something wherein he really has such title.

4. For if something has been delivered to another in a legal transaction (as by sale, donation, marriage-portion or legacy) but the recipient has not yet been perfected in his ownership; supposing he has casually lost possession of the thing, he has no direct action *in rem*² to recover it; for common-law actions were introduced expressly with the view of enabling parties to claim their own property rights; but inasmuch as it was certainly inequitable that there should be no remedy here, an action was invented by the Praetor, wherein the party who has lost possession declares that he has acquired a usucaptive title to the thing and so claims it³ as his own. This action is called Publician, because

¹ That this is the meaning to be attached to the word *possessor* seems clear as well from the context as from other passages where a past signification is applied to a word of apparently present meaning, e.g. in IV. 6. 5 below *dominus* stands for *qui dominus fuerat*; in D. 41. 1. 56. 1, *insula* stands for *quae insula fuerat*; and in D. 27. 3. 13 and 14 *tutor post pubertatem* is one who

has been *tutor* prior to the attainment of puberty.

² *Directam* is here opposed to *prædioriam*, not to *contrariam*, as in § 2 above.

³ The proper word would be *intendit* or *petit*, *vindicat* being strictly the technical term for a common law action to recover something.

a Publicio Praetore¹ in edicto proposita est. (5.) Rursus ex diverso, si quis cum reipublicae causa abesset vel in hostium potestate esset, rem eius qui in civitate esset usuceperit, permittitur domino², si possessor reipublicae causa abesse desierit, tunc intra annum³, rescissa usucapione, eam petere, id est ita petere, ut dicat possessorem usu non cepisse et ob id suam esse rem⁴. quod genus actionis quibusdam et aliis, simili aequitate motus, Praetor accommodat, sicut ex latiore digestorum seu pandectarum volumine intellegere licet⁵. (6.) Item si quis in fraudem creditorum rem suam alicui tradiderit, bonis eius a

it was first set forth in an edict by the Praetor Publicius¹. 5. So again in the converse case, supposing a person during absence on the public service, or during the time when he is in the enemy's power, has acquired an usucaptive title to the property of a person resident at home, then in case of the possessor ceasing to be absent on the public service, the (former) owner² is allowed at any time within a year³ to set the usucapion aside and sue for the property, that is, to sue with a declaration that the possessor has not completed usucapion, and that therefore the article in dispute is his own⁴. And the Praetor grants this form of action to certain other persons also, influenced by similar equitable motives, as we may understand from the more extensive volume of the Digest or Pandects⁵. 6. Again, if one man has delivered to another some article of his property in order to defraud his creditors, after the latter have been put in possession of his

¹ Possibly the Q. Publicius who was Praetor in Cicero's time: see *pro Cluentio* 45. The edict above mentioned was at any rate in existence in Neratius' time, as we perceive from D. 6. 2. 17. It is quoted verbatim by Ulpian in D. 6. 2. 1. pr.

² See note on the preceding page.

³ This time of limitation was afterwards extended to four years by a rescript of Justinian, C. 2. 53. 7. The *annus* spoken of in the text was an *annus utilis*, not *continuus*, i.e. those days were not counted on which the prosecutor of

the claim was prevented by any sufficient cause from enforcing it.

⁴ In this case the fiction or assumption is that the usucapio though perfect has failed, whereas the prior assumption was that though not completed it was available. The action here spoken of, in some respects the opposite of the Publician action which was the subject of the preceding paragraph, is termed *actio rescissoria*.

⁵ The reference is to D. 4. 6; see especially D. 4. 6. 1. 1, where the actual words of the edict are quoted.

creditoribus ex sententia Praesidis possessis¹, permittitur ipsis creditoribus, rescissa traditione, eam rem petere, id est dicere eam rem traditam non esse et ob id in bonis debitoris mansisse². (7.) Item Serviana et quasi Serviana, quae etiam hypothecaria vocatur, ex ipsius Praetoris iurisdictione substantiam capit³. Serviana autem experitur quis de rebus coloni quae pignoris iure pro mercedibus fundi ei tenentur⁴; quasi Serviana autem, qua creditores pignora hypothecasve persequuntur. inter pignus autem et hypothecam, quantum ad actionem hypothecariam, nihil interest: nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque⁵ hac appellatione continetur. sed in aliis differentia est: nam pignoris appella-

goods by order of a *praeses*¹, these creditors are allowed to set the delivery aside and sue for the article, that is to declare that it never was delivered and consequently remained part of the debtor's effects². 7. Again, the Servian and quasi-Servian actions, the latter being also styled "hypothecarian," originate from the Praetor's own jurisdiction³. By the Servian action a landlord has his remedy in respect of a tenant's property held by him in pledge for the rent of the land⁴; whilst the quasi-Servian is the remedy available to creditors suing for things pledged or mortgaged. There is no difference between a pledge and a mortgage so far as the hypothecarian action is concerned: for where there has been an agreement between creditor and debtor for having some particular article bound for a debt, both forms of security⁵ are comprised in the one term (*hypotheca*); although in other respects there is a difference,

¹ III. 12.

² This action is styled by Theophilus *actio Pauliana in rem*. The creditors sue as *quasi-domini* on account of the *missio in bona* granted by the *praeses*; hence the formula quoted in Gaius IV. 36 would with a slight modification have been applicable to the present case.

³ The actions already mentioned were based on fictions, the *jus civile* being extended by the Praetor to cases within its spirit but beyond its letter. The Servian and quasi-

Servian, however, were perfectly novel remedies invented by the Praetor. Hence Gaius when classifying actions says, "quaedam ad legis actionem exprimuntur, quaedam sua vi et potestate consistunt." IV. 10.

⁴ The stock and crops of the tenant of land, and the furniture of the tenant of a house, were by implication of law pledged to the landlord for the rent. D. 20. 2. 3, D. 20. 2. 4. pr., D. 20. 2. 7.

⁵ Both *pignus* and *hypotheca*.

tione eam proprie contineri dicimus quae simul etiam traditur creditori, maxime si mobilis sit¹; at eam quae sine traditione nuda conventionione tenetur proprie hypothecae appellatione contineri dicimus. (8.) In personam quoque actiones ex sua iurisdictione proposita habet Praetor. Veluti de pecunia constituta, cui similis videbatur receptitia²: sed ex nostra constitutione³ (cum et si quid plenius habebat, hoc in pecuniam constitutam transfusum est) et ea quasi supervacua iussa est cum sua auctoritate a nostris legibus recidere. Item Praetor proposuit de peculio servorum filiorumque familias, et ex qua quaeritur an actor iuraverit⁴, et alias complures⁵. (9.) De pecunia autem constituta⁶ cum omnibus agitur, quicumque vel pro se vel pro

for in our definition of the term "pledge" is comprehended any article which is at once delivered to the creditor, especially if it be a moveable¹; but anything which is held by mere agreement without delivery, we define to be properly designated by the word "mortgage." 8. The Praetor has also provided actions in *personam* emanating from his own proper jurisdiction: as for instance the *actio de pecunia constituta*, which the *actio receptitia*² used to resemble: but by a constitution of ours³ the latter (after having had any extra provisions which it possessed transferred to the *actio pecuniae constitutae*) has been ordered to be removed with all its authority from our code of laws, by reason of its superfluity. The Praetor has further provided an action for the *peculium* of slaves and persons under *potestas*, also one wherein the question tried is whether the plaintiff has taken the oath⁴, and many other actions⁵. 9. The action *de constituta pecunia*⁶ can be brought against

¹ D. 50. 16. 238. 2.

² This was an action allowed against bankers who undertook to satisfy the creditor of a customer. See C. 4. 18. 2 *sub fin.*, and the commentaries of Theophilus on this passage. "Recipitur, id est promittitur, id est reo iudicato respondetur," writes Asconius Pedianus.

³ C. 4. 18. 2.

⁴ See paragraphs 10 and 11 below.

⁵ For instance, the *tributoria*; the *de in rem verso*; the *quod iussu*;

and the penal actions mentioned subsequently.

⁶ *Constitutum* was an agreement by which a person bound himself to pay a debt already existing; D. 13. 5. 1. 1. The debt might be civil, praetorian, or merely binding in conscience; D. 13. 5. 7 and 8. Originally it was required to be a debt of money; then it was extended to all things "quae pondere, numero, mensura constant," and finally by virtue of C. 4. 18. 2 to any debt whatever.

alio soluturum se constituerit, nulla scilicet stipulatione interposita. nam alioquin, si stipulanti promiserit, iure civili tenetur. (10.) Actiones autem de peculio ideo adversus patrem dominumve comparavit Praetor, quia licet ex contractu filiorum servorumve ipso iure non teneantur, aequum tamen est peculio tenus, quod veluti patrimonium est filiorum filiarumque, item servorum, condemnari eos¹. (11.) Item si quis postulante adversario iuraverit deberi sibi pecuniam quam peteret², neque ei solvatur, iustissime accommodat ei talem actionem per quam non illud quaeritur, an ei pecunia debeatur, sed an iuraverit. (12.) Poenales quoque actiones bene multas ex sua iurisdictione introduxit: veluti adversus eum qui quid ex albo eius corrupisset³: et in eum qui patronum vel parentem in ius vo-

all persons who have engaged to make a payment either on their own behalf or for another, provided no stipulation has been entered into; for in the case of their promising to a stipulator they are bound by the civil law. 10. The Praetor has drawn up the actions for the *peculium* against the father or master, because although they are not liable according to the letter of the law on the contract of their sons or slaves, yet it is equitable that they should be made liable up to the amount of the *peculium*, since this is, so to speak, the patrimony of sons and daughters, and of slaves also¹. 11. Again where a man on the requisition of his adversary has taken oath that the money for which he is suing is due to him², and still it is not paid to him, the Praetor with very great propriety allows him an action in which the inquiry is, not whether the money is due, but whether he has taken the oath. 12. The Praetor has also introduced very many penal actions by virtue of his special jurisdiction, as for instance against him who has caused injury to any part of his *album*³; and against him who has

¹ For further information as to this action see IV. 7. 4, and Gaius IV. 73, 74.

² The words of the edict as set out in D. 12. 2. 3. pr. are, "Si is cum quo agetur conditione delata iuraverit." A voluntary oath was of no account; it must be tendered by the plaintiff, and then, as Ulpian tells us, "ait Praetor, eum a quo

jusjurandum petetur, solvere aut jurare cogam." D. 12. 2. 34. 6.

³ *Corrupisset* is a word of pretty wide signification, and is thus paraphrased by Paulus: "*raserit, corruperit, sustulerit, mutaverit, turbaverit.*" *Album*, of course, is the board or tablet set up in the forum, and containing the praetorian edict.

casset, cum id non impetrasset¹; item adversus eum qui vi exemerit eum qui in ius vocaretur², cuiusve dolo alius exemerit; et alias innumerabiles. (13.) Praejudiciales actiones in rem esse videntur³, quales sunt per quas quaeritur, an aliquis liber vel libertus sit, vel de partu agnoscendo. ex quibus fere una illa legitimam causam habet per quam quaeritur, an aliquis liber sit; ceterae ex ipsius Praetoris iurisdictione substantiam capiunt.

14. Sic itaque discretis actionibus, certum est non posse actorem rem suam ita ab aliquo petere, si paret eum dare oportere: nec enim quod actoris est, id ei dari oportet, quia scilicet dari cuiquam id intellegitur quod ita datur, ut eius fiat; nec res quae iam actoris est, magis eius fieri potest⁴. plane odio furum, quo magis pluribus actionibus teneantur, effectum

cited his patron or ascendant into court without permission granted¹; so also against him who has forcibly rescued a man cited into court, or by whose collusion another has rescued him²; as well as innumerable other actions. 13. Prejudicial actions seem to be *in rem*³, such as those whereby the question is raised whether a man is a freeman or a freedman, or concerning the recognition of paternity; out of which that one only has a civil law origin whereby the question is raised whether a man is free; the others have their origin from the Praetor's jurisdiction.

14. Actions therefore being thus classified, it is certain that one cannot claim a thing that is his from another person by the form, "should it appear that he ought to give it," for there can be no obligation to give that which is the plaintiff's own, because in fact that is understood to be given to a man which is so given as to become his; nor can a thing which is the plaintiff's become his more than it already is⁴. But from a detestation of thieves, in order that they may be liable to a greater number of actions, it has been settled that besides the

¹ This is explained in IV. 16. 3.

² Gaius IV. 46.

³ G. IV. 44. Prejudicial actions were essentially *in rem*; for they were brought merely to establish

a fact as preliminary to a pending action. See Zimmern's *Traité des actions chez les Romains* § lxvi., Heineccius' *Antiqq. Rom.*, IV. 6. 34, notet.

⁴ G. IV. 4.

est, ut extra poenam dupli aut quadrupli rei recipiendae nomine fures etiam hac actione teneantur, si paret eos dare oportere, quamvis sit adversus eos etiam haec in rem actio per quam rem suam quis esse petit¹. (15.) Appellamus autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare facere oportere intenditur, condictionses. condicere enim est denuntiare prisca lingua; nunc vero abusive dicimus conditionem actionem in personam esse qua actor intendit dari sibi oportere. nulla enim hoc tempore eo nomine denuntiatio fit².

16. Sequens illa divisio est, quod quaedam actiones rei persequendae gratia comparatae sunt, quaedam poenae persequendae, quaedam mixtae sunt³. (17.) Rei persequendae causa comparatae sunt omnes in rem actiones. Earum vero actionum quae in personam sunt, hae quidem quae ex contractu nascun-

penalty of double or quadruple the amount (of the thing stolen) thieves may, with the object of recovering the thing, also be made liable under an action running thus: "Should it appear that they ought to give the thing," although there also lies against them the action *in rem* whereby a person sues for a thing on the ground that it is his own¹. 15. Now we call actions *in rem* "vindicationes," whilst actions *in personam*, wherein we assert that our opponent ought to give us something or do something for us, we call "condictionses." For in the old phraseology the words *condicere* and *denuntiare* are identical: now, however, in an improper sense, we say that a condition is an action *in personam*, whereby the plaintiff declares that something ought to be given him; for at the present time there is no *denuntiatio* (warning to appear in Court) in such a case².

16. The next division is, that some actions are provided for the purpose of our obtaining a particular thing, some for our obtaining a penalty, and some are mixed³. 17. All actions *in rem* are framed for the object of obtaining a particular thing. And so also of those actions which are *in personam*, almost all

¹ Gaius IV. 4.

² Gaius IV. 18. In the old *legis actio* termed a *condictio*, the peculiarity was that the plaintiff used to give notice to his opponent to be in

court on the thirtieth day to receive a *iudex*.

³ *Mixtae*=for the thing and a penalty; Gaius IV. 6.

tur, fere omnes rei persequendae causa comparatae videntur: veluti quibus mutuam pecuniam vel in stipulatum deductam petit actor, item commodati, depositi, mandati, pro socio, ex empto vendito, locato conducto. plane si depositi agetur eo nomine, quod tumultus, incendii, ruinae, naufragii causa depositum sit, in duplum actionem Praetor reddit, si modo cum ipso apud quem depositum sit, aut cum herede eius ex dolo ipsius agetur¹: quo casu mixta est actio. (18.) Ex maleficiis vero proditae actiones aliae tantum poenae persequendae causa comparatae sunt, aliae tam poenae quam rei persequendae, et ob id mixtae sunt². Poenam tantum persequitur quis actione furti: sive enim manifesti agatur quadrupli, sive nec manifesti dupli, de sola poena agitur: nam ipsam rem propria actione persequitur quis, id est suam esse petens³, sive fur ipse eam rem

that arise from a contract are resorted to for the purpose of obtaining a particular thing; as, for instance, those wherein the plaintiff sues for money lent or made the subject of a stipulation, so also the action on a loan, a deposit, a mandate, a partnership, a sale and a letting. But clearly where the action of deposit is brought on the special ground that the article was deposited in consequence of tumult, fire, fall of buildings, or shipwreck, the Praetor allows an action for twice the amount, provided it be brought against him with whom the deposit was made, or against his heir, on account of his personal fraud¹; and so the action is mixed. 18. The actions provided in the case of delicts are in some cases framed only for the purpose of obtaining a penalty, in others for that of obtaining both a penalty and the thing, and consequently are mixed². A person sues for a penalty only in the action of theft; for whether it be an action of manifest theft for the fourfold amount, or of non-manifest theft for the double amount, it is an action for a penalty only: for the person obtains the thing itself by a separate action, viz. by claiming it as his own³, whether the possessor of the thing be the thief himself or any

¹ From D. 16. 3. 1. 1 and D. 16. 3. 18, we see that the action against the heir was *in simplum*, if the fraud had been committed by his ancestor, the depositary; but *in duplum*, if the fraud had been committed by himself. The fraud con-

sisted in denying the receipt of the deposit: a mere declaration of inability to pay would found an action *in simplum*.

² Gaius IV. 8, 9.

³ Sc. by bringing a *vindicatio*.

possideat sive alius quilibet; eo amplius adversus furem etiam condictio est rei¹. (19.) Vi autem bonorum raptorum actio mixta est, quia in quadruplum rei persecutio continetur, poena autem tripli est. Sed et legis Aquiliae actio de damno mixta est, non solum si adversus infitiantem in duplum agatur², sed interdum et si in simplum quisque agit. veluti si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni pretii fuerit: tanti enim damnatur quanti is homo in eo anno plurimi fuerit, secundum iam traditam divisionem³. Item mixta est actio contra eos qui relictæ sacrosanctis ecclesiis vel aliis venerabilibus locis legati vel fideicommissi nomine dare distulerint usque adeo, ut etiam in iudicium vocarentur: tunc etenim et ipsam rem vel pecuniam quæ relictæ est dare compelluntur, et aliud tantum pro poena, et ideo in duplum eius fit condemnatio⁴.

one else; and besides this, a condiction may be brought against the thief¹. 19. The action for goods violently carried away is a mixed one, because the recovery of the thing itself is included in the fourfold amount, and so the penalty is threefold. Moreover, the action for damage under the *Lex Aquilia* is a mixed one, not only where it is brought for double the amount against a wrong-doer who sets up a denial², but sometimes where a person sues for the simple value: for instance, where a person has killed a lame or one-eyed slave, who was during the year preceding sound and valuable: for here the wrong-doer is amerced to the extent of the slave's highest value during the year, in accordance with the distinction already laid down³. Again there is a mixed action against those who have so long delayed to give things left by way of legacy or trust to consecrated churches or other hallowed buildings, as to require a citation into Court; for in such case they are compelled to give both the thing itself or the money which was left, and the same amount in addition by way of penalty, and thus the wrong-doer's amercement is for double⁴.

¹ Not concurrently, but alternatively with the *vindicatio*.

² D. 9. 2. 2. 1.

³ This refers to the distinction in IV. 3. 9 and 13 as to killing and

maiming, the period being thirty days in the latter case and one year in the former.

⁴ C. 1. 3. 46. 7.

20. Quaedam actiones mixtam causam obtinere videntur, tam in rem, quam in personam¹. qualis est familiae erciscundae actio quae competit coheredibus de dividenda hereditate; item communi dividundo quae inter eos redditur inter quos aliquid commune est, ut id dividatur; item finium regundorum quae inter eos agitur qui confines agros habent. in quibus tribus iudiciis permittitur iudici rem alicui ex litigatoribus ex bono et aequo adiudicare, et si unius pars praegravare videbitur, eum invicem certa pecunia alteri condemnare².

21. Omnes autem actiones vel in simplum conceptae sunt, vel in duplum, vel in triplum, vel in quadruplum: ulterius autem nulla actio extenditur. (22.) In simplum agitur, veluti ex stipulatione, ex mutui datione, ex empto vendito, locato conducto, mandato, et denique ex aliis compluribus causis. (23.) In duplum agimus, veluti furti nec manifesti, damni

20. Some actions seem also to have a mixed character, in the sense of being both *in rem* and *in personam*¹; such is the *actio familiae erciscundae* allowed to co-heirs for the purpose of dividing an inheritance; also that *communi dividundo* given to those who have something in common, for the purpose of procuring a division; also that *finium regundorum* carried on between those who own contiguous lands. In these three actions the judge is allowed to assign an article to any of the parties upon equitable principles, and where he sees the share of one to be excessive to order him to pay as an equivalent a certain amount to the other².

21. All actions are directed to the obtaining single, double, triple or quadruple value. Beyond these amounts no action goes. 22. Single damages are aimed at in actions arising out of a stipulation, a loan for consumption, a sale, a letting, a mandate, as well as out of many other transactions. 23. We aim at twofold damage in actions of non-manifest theft, of

¹ These actions are as a matter of fact personal, being brought by one heir against the other: but they are to some extent real also, for although not for a specific thing, they are for a share of a specific thing. Hence under the formulary system

the Praetor did not commission the *judex* by a *condemnatio*, to award a sum of money; but by an *adjudicatio*, to assign a share of the matter to which both laid claim. Gaius IV. 42.

² IV. 17. 4—6.

iniuriæ ex lege Aquilia, depositi ex quibusdam casibus¹. item servi corrupti quæ competit in eum cuius hortatu consiliove servus alienus fugerit, aut contumax adversus dominum factus est, aut luxuriose vivere coeperit, aut denique quolibet modo deterior factus sit²: in qua actione etiam earum rerum quas fugiendo servus abstulit aestimatio deducitur. item ex legato quod venerabilibus locis relictum est, secundum ea quæ supra diximus³. (24.) Tripli vero cum quidam maiorem veræ aestimationis quantitatem in libello conventionis inseruit⁴, ut ex hac causa viatores, id est executores litium ampliorem summam sportularum nomine exegerint: tunc enim id quod propter eorum causam damnum passus fuerit reus in triplum ab actore consequetur, ut in hoc triplo et simplum in quo damnum passus est connumeretur. quod nostra constitutio⁵ induxit quæ in

wrongful injury founded on the *Lex Aquilia*, and of deposit under certain circumstances¹. So also in the case of a slave corrupted, which action lies against one by whose persuasion or advice a slave belonging to another person has fled away, or has become contumacious towards his master, or has begun to live luxuriously, or in fine, become deteriorated in any way whatever²: and in this action an account is also taken of those things which the slave has carried off in his flight: and again (the double value is sued for) in an action upon a legacy left to sacred places, according to what we have stated above³. 24. The claim for triple damages is made when a plaintiff has in his statement of his case⁴ exaggerated the real amount of his claim, thereby enabling the officers of the court, that is the bailiffs executing process, to exact a larger amount under the name of court fees; for then the defendant will obtain from the plaintiff treble the amount of the loss sustained by him owing to their exactions, but so that in this treble is included the actual sum in which he was overcharged. This regulation a constitution of our own⁵, con-

¹ The circumstances named above in § 17.

² D. 11. 3: D. 11. 4.

³ IV. 6. 19.

⁴ In the system of procedure current in Justinian's days the plaintiff stated to the Praetor the ground of

his action, which thereupon was put into writing and formally served on the defendant by an officer of the court; hence the *libellus conventionis* followed immediately upon the *editio actionis*.

⁵ C. 3. 10. 2. 2.

nostro codice fulget, ex qua dubio procul est ex lege condictionem emanare¹. (25.) Quadrupli, veluti furti manifesti, item de eo quod metus causa factum sit², deque ea pecunia quae in hoc data sit, ut is cui datur calumniae causa negotium alicui faceret vel non faceret³, item ex lege condictionis a nostra constitutione oritur, in quadruplum condemnationem imponens his executoribus litium qui contra nostrae constitutionis normam a reis quicquam exegerint⁴. (26.) Sed furti quidem nec manifesti actio et servi corrupti a ceteris de quibus simul locuti sumus eo differt, quod hae actiones omnimodo dupli sunt; at illae, id est damni iniuriae ex lege Aquilia, et interdum depositi, infinitatione duplicantur, in contententem autem in simplex dantur; sed illa quae de his competit quae relictis venerabilibus locis sunt non solum infinitatione duplicatur, sed et si distulerit relictis solutio-

spicuous in our code, has introduced, on which it is abundantly clear that an *actio condictionis ex lege* can be founded¹. 25. The claim for quadruple damages arises in such cases as that of manifest theft, or for something done through fear², or for money given expressly for the purpose of bribing a man to do or omit to do something against another vexatiously³; so also there is an *actio condictionis ex lege* under a constitution of ours imposing a quadruple penalty on those officers of the courts who exact anything from defendants contrary to the principle of that constitution⁴. 26. But the actions for non-manifest theft and for corrupting a slave differ from the rest of which we have spoken in conjunction with them in this respect, that they are invariably for double; whereas the others, that is, the one for wrongful injury based upon the Aquilian law, and sometimes that for deposit, result in double damages if there is a denial, and are confined to single damages if there is an admission. The action, however, which is applicable to the recovery of things left to holy places, not only results in double damages by a denial,

¹ When a *lex* or *constitutio* created a duty, but did not specify by what form of action it was to be enforced, the person who infringed the law was considered to be under a quasi-contract to submit to the penalties set down in the law, and the personal action brought against

him being neither *ex contractu* nor *ex delicto*, was styled *ex lege*. See Paulus in D. 13. 2, Mackelley's *Syst. Jur. Rom.* § 195.

² D. 4. 2. 14. 1.

³ D. 3. 6. 1.

⁴ C. 3. 2. 2: Nov. 124. cap. 3.

nem usque quo iussu magistratuum nostrorum conveniatur; in confitentem vero, et ante quam iussu magistratuum conveniatur solventem, simpli redditur¹. (27.) Item actio de eo quod metus causa factum sit a ceteris de quibus simul locuti sumus eo differt, quod eius natura tacite continetur², ut qui iudicis iussu ipsam rem actori restituat absolvatur. quod in ceteris casibus non ita est, sed omnimodo quisque in quadruplum condemnatur, quod est et in furti manifesti actione.

28. Actionum autem quaedam bonae fidei sunt, quaedam stricti iuris³. Bonae fidei sunt hae: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelae, commodati, pigneraticia, familiae erciscundae, communi dividundo, praescriptis verbis⁴ quae de aestimato⁵ proponitur, et ea quae ex permutatione competit, et hereditatis petitio. quam-

but also when the heir has delayed the payment of the thing bequeathed until cited into court by order of the magistrates; whilst the amount is reduced to the simple value where the party admits his liability and pays before he is cited into court by the magistrates' order¹. 27. Again the action for something done through fear differs from the other actions of which we have spoken in connection with it in this fact, that it is tacitly implied in its nature² that the defendant may be acquitted where he restores the thing to the plaintiff according to the judge's order. This is not so in other cases, but defendants are under any circumstances condemned to pay fourfold, as in the action for manifest theft.

28. Some actions again are *bonae fidei*, some are *stricti iuris*³. The former are actions arising on sale, hiring, voluntary agency, mandate, deposit, partnership, guardianship, loan, pledge, partition of an inheritance, division of property held in common, the action *praescriptis verbis*⁴ which is provided for a sale at an appraised value⁵, the action arising out of an

¹ IV. 6. 19.

² The action *quod metus causa* was an *actio arbitraria*; hence we see from § 31 below that restitution or reparation freed the defendant from further liability.

³ See App. O.

⁴ See App. O.

⁵ The *actio aestimatoria* was brought against a person who had

engaged to sell an article belonging to another for a specified price. Thus the contract was a mixture of sale (by reason of the fixed price), letting (because the article was in a manner let out to be sold), hiring (because there was a contract for the vendor's services) and mandate (i.e. agency). For these reasons a special action was provided, necessarily

vis enim usque adhuc incertum erat, sive inter bonae fidei iudicia connumeranda sit, sive non, nostra tamen constitutio aperte eam esse bonae fidei disposuit¹. (29.) Fuerat antea et rei uxoriae actio² ex bonae fidei iudiciis: sed cum pleniorum esse ex stipulatu actionem invenientes, omne ius quod res uxoria ante habebat cum multis divisionibus in ex stipulatu actionem quae de dotibus exigendis proponitur transtulimus, merito, rei uxoriae actione sublata, ex stipulatu quae pro ea introducta est naturam bonae fidei iudicii tantum in exactione dotis meruit, ut bonae fidei sit³. sed et tacitam ei dedimus hypothecam: praeferi autem aliis creditoribus in hypothecis tunc censuimus, cum ipsa mulier de dote sua experietur, cuius

exchange and the real action for an inheritance; for although it was till lately uncertain whether this latter was to be reckoned among *bonae fidei* actions or not, yet a constitution of ours has clearly settled it to be *bonae fidei*¹. 29. There was formerly also an action to recover the wife's property², which was one of the *bonae fidei* actions, but inasmuch as we found the action to enforce a stipulation to be of a larger nature, we have transferred all the rules which formerly applied to the wife's property, with their many divisions, to the action based on a stipulation and directed to the end of reclaiming marriage-portions; and so on the abolition of the action to recover the wife's property the stipulatory action introduced in its place has very properly assumed the character of the *bonae fidei* action and become *bonae fidei* itself, though only when employed to recover a marriage-portion³. Moreover we have given the wife an implied mortgage; but we only allow her to have a preference over other mortgage-creditors, when she herself (for whose sake alone we have made this provision) is suing for her

praescriptis verbis, for the circumstances of the contract might vary in different cases, and the variations were of the very essence of the matter. The object of the action was to compel the defendant to restore the article undamaged, or to pay the price he had engaged to obtain for it. See D. 19. 3. 1.

¹ C. 3. 31. 12. 3.

² This action was also called *actio dotis*, and a full account of it

will be found in App. B.

³ See C. 5. 13. Justinian amalgamated the distinctive characteristics of an *actio ex stipulatu* and an *actio rei uxoriae*, so as to produce a special action called *actio ex stipulatu de dotibus exigendis*. After Justinian's constitution the stipulation was presumed to have been entered into with regard to all marriage-portions.

solius providentia hoc induximus¹. (30.) In bonae fidei autem iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi quantum actori restitui debeat. In quo et illud continetur, ut si quid invicem actorem praestare oporteat, eo compensato, in reliquum ei is cum quo actum est condemnari debeat². sed et in strictis iudiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur. sed nostra constitutio³ eas compensationes quae iure aperto nituntur latius introduxit, ut actiones ipso iure minuant, sive in rem sive personales sive alias quascumque, excepta sola depositi actione⁴, cui aliquid compensationis nomine opponi satis impium esse credidimus, ne sub praetextu compensationis depositarum rerum quis exactione defraudetur.

31. Praeterea quasdam actiones arbitrarias, id est ex arbitrio iudicis pendentes, appellamus⁵, in quibus, nisi arbitrio iudicis

marriage-portion¹. 30. In actions *bonae fidei* free scope seems to be given to the judge of estimating fairly and equitably the proper amount of payment to the plaintiff; and herein he has this power, that if (he finds that) the plaintiff ought on his side to pay something, he may set that amount off and condemn the defendant to pay to the plaintiff the balance². In actions *stricti juris* also, according to a rescript of the Emperor Marcus, set-off was allowed when a plea of fraud was put in; but a constitution of ours³ has more widely introduced those sets-off which rest upon manifest justice, so that they reduce actions as a matter of course, whether *in rem*, or personal or any other whatever, with the exception only of the action for deposit⁴, in opposition to which we have held it to be contrary to honour that there should be anything opposed by way of set-off, for fear of a depositor being prevented from the recovery of his deposit under the pretext of a set-off against him.

31. Moreover we bestow on certain actions the name *arbitrariae*, that is, "depending on the discretion (*arbitrium*) of the judge⁵." And in these, unless the defendant make satis-

¹ C. 5. 12. 30: C. 8. 18. 12. 1.

² Gaius IV. 61; Paulus S. R. 11.

5. 3: D. 16. 2.

³ C. 4. 31. 14.

⁴ C. 4. 34. 11.

⁵ Gaius IV. 163. See also App. O.

is cum quo agitur actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat¹, condemnari debeat. Sed istae actiones tam in rem quam in personam inveniuntur. in rem: veluti Publiciana², Serviana de rebus coloni³, quasi Serviana, quae etiam hypothecaria vocatur. in personam: veluti quibus de eo agitur quod aut metus causa⁴ aut dolo malo⁵ factum est, item qua id quod certo loco promissum est petitur⁶. ad exhibendum quoque actio ex arbitrio iudicis pendet. In his enim actionibus et ceteris similibus permittitur iudici ex bono et aequo, secundum cuiusque rei de qua actum est naturam, aestimare quemadmodum actori satisfieri oporteat.

32. Curare autem debet iudex, ut omnimodo quantum possibile ei sit, certae pecuniae vel rei sententiam ferat, etiamsi de incerta quantitate apud eum actum est⁷.

faction to the plaintiff according to the discretion of the judge, as for instance by the restoration of the thing, or by its production, or by payment, or by giving up the slave in a noxal case¹, he ought to be condemned. Actions of this kind are to be found both *in rem* and *in personam*. *In rem*, such as the Publician action²; the Servian, for the property of a rural tenant³; and the quasi-Servian, also called hypothecarian.—*In personam*, such as those wherein the question at issue is whether something has been done through fear⁴ or with fraud⁵, as also that in which we sue for something which was promised to be given in a particular place⁶. The action too which is brought for the production of a thing rests on the discretion of the judge; for in these actions and in others like them the judge is allowed to decide the kind of satisfaction due to the plaintiff on fair and equitable principles, according to the nature of the matter about which the suit is brought.

32. A judge ought to take care that in every case, so far as it is possible, he make an order for a specific amount or for a specific thing, although the question before him be about an unascertained quantity⁷.

¹ IV. 8.

² IV. 6. 4.

³ IV. 6. 7.

⁴ IV. 6. 27.

⁵ D. 4. 3. 1. 1, and App. O.

⁶ D. 13. 4. 1, and App. O.

⁷ Gaius IV. 48, 52.

33. Si quis agens in intentione sua plus complexus fuerit quam ad eum pertineret¹, causa cadebat, id est rem amittebat, nec facile in integrum a Praetore restituebatur², nisi minor erat vigintiquinque annis. huic enim sicut in aliis causis causa cognita succurrebatur, si lapsus iuventute fuerat, ita et in hac causa succurri solitum erat. sane si tam magna causa iusti erroris interveniebat³, ut etiam constantissimus quisque labi posset, etiam maiori vigintiquinque annis succurrebatur: veluti si quis totum legatum petierit, post deinde prolati fuerint codicilli quibus aut pars legati adempta sit aut quibusdam aliis legata data sint, quae efficiebant, ut plus petisse videretur petitor quam dodrantem⁴, atque ideo lege Falcidia legata mi-

33. When a plaintiff comprised in his plaint¹ more than belonged to him he used formerly to fail in his cause, i.e. he lost the thing; nor was restitution to his former position² readily granted to him by the Praetor, unless he was under twenty-five years of age; for just as assistance was usually given in other cases on proof of reason for it, so also was assistance given to this person, supposing he had acted in error owing to his youth. And further if there was so much occasion for a justifiable mistake³ that even the most wary man might have been misled, assistance was granted although the person was above twenty-five years of age. As, for example, where any one sought to recover the whole of a legacy, and afterwards a codicil was produced whereby either a portion of the legacy was adeemed, or legacies were given to some other person, with the result of causing the claimant to seem to demand more than three-fourths⁴, inasmuch as the legacies were diminished by the Lex Falcidia.

¹ Gaius IV. 53.

² Here *restitui in integrum*=to have the right of bringing a new action on the old facts. As soon as a litigated matter had arrived at the *litis contestatio* a novation took place (III. 29. 3), and the defendant was no longer under obligation to fulfil his original engagement or duty, but bound to carry out the award of the court; if then the court acquitted him, the plaintiff obviously could no longer sue on

the old obligation, as that had been destroyed by the novation. Hence *restitui in integrum* signifies that the plaintiff is freed from the damaging effects of the novation, or, in other words, can bring a new action on the original case. See Gaius III. 180, 181, Paulus S. R. I. 7.

³ *Iustus*=*probabilis* in this passage. See Brissonius *sub verb.*

⁴ This passage is so loosely worded that it is impossible to

nuebantur. Plus autem quatuor modis petitur: re, tempore, loco, causa¹. Re: veluti si quis pro decem aureis qui ei debebatur viginti petierit, aut si is cuius ex parte res est totam eam vel maiore ex parte suam esse intenderit. Tempore: veluti si quis ante diem vel ante condicionem petierit. quia ratione enim qui tardius solvit quam solvere deberet, minus solvere intellegitur; eadem ratione qui praemature petit, plus petere videtur. Loco plus petitur: veluti cum quis id quod certo loco sibi stipulatus est alio loco petit, sine commemoratione illius loci in quo sibi dari stipulatus fuerit; verbi gratia si is qui ita stipulatus est: Ephesi dare spondes? Romae pure intendat dari sibi oportere. ideo autem plus petere intellegitur, quia utilitatem quam habuit promissor, si Ephesi solveret, adi-

Too much is sued for in four ways; in substance, in time, in place, in quality¹. In substance, as where one has sued for twenty *aurei* instead of the ten that were due to him, or where he who has a share in a particular thing has claimed the whole or too large a part of it. In time, as where one has sued before the appointed day or the fixed condition; for whereas he who pays later than he ought to pay is understood to make too small a payment, so by parity of reasoning he who sues before the time is held to sue for too much. Too much is sued for in respect of place: as where a person who has stipulated for something to be given him at a specified place sues for it elsewhere without referring to the particular place where he had stipulated for the transfer of the thing; for example, suppose a person having stipulated in this form, "Do you promise to give me the thing at Ephesus?" should declare simply that the gift ought to be made to him at Rome. Now here he is understood to sue for too much, because by the unconditional declaration he takes away the advantage which the promiser would have had, supposing he did pay at Ephesus; and

translate it: for *plus quam dodrantem* Justinian should have written *plus quam suam ratam partem dodrantis*: and instead of *atque ideo* there should be *ideo quod* or something analogous. Still though the sentence is thoroughly ungrammatical, its general sense is plain: the

heir had a right to retain one quarter of the inheritance, and the plaintiff ought therefore to have claimed his proper proportion of three-quarters of the estate, and not have demanded his legacy in full.

¹ Paulus S. R. I. 10.

mit ei pura intentione : propter quam causam alio loco petenti arbitraria actio proponitur¹, in qua scilicet ratio habetur utilitatis quae promissori competitura fuisset, si illo loco solveret. quae utilitas plerumque in mercibus maxima invenitur, veluti vino, oleo, frumento, quae per singulas regiones diversa habent pretia : sed et pecuniae numeratae non in omnibus regionibus sub iisdem usuris fenerantur. si quis tamen Ephesi petat, id est eo loco petat, quo ut sibi detur, stipulatus est, pura actione recte agit : idque etiam Praetor monstrat, scilicet quia utilitas solvendi salva est promissori. Huic autem qui loco plus petere intellegitur proximus est is qui causa plus petit : ut ecce si quis ita a te stipulatus sit : hominem Stichum aut decem aureos dare spondes ? deinde alterutrum petat, veluti hominem tantum, aut decem aureos tantum. ideo autem plus petere intellegitur, quia in eo genere stipulationis promissoris est electio, utrum pecuniam an hominem solvere malit : qui

for this reason an arbitrary action¹ is provided for the party suing in another place, wherein is taken into consideration the advantage which would have accrued to the promiser, supposing he had paid at the very place (where he promised to pay). This advantage is very often found to be highly important in articles of commerce, such as wine, oil, corn, which bear different values in each particular locality ; and coined money too is not lent at the same rates of interest in every place. Where, however, a person sues at Ephesus, that is, in the very spot where he stipulated to receive payment, he sues correctly by the direct action ; and this too the Praetor states, because the advantage of payment is secured to the promiser. The person who sues for too much in respect of quality bears a close resemblance to him who sues for too much in respect of place :—as for instance where a person having stipulated with you in the form : “Do you promise to give your slave Stichus or ten *aurei* ?” thereupon claims one or the other, for example, the slave only or the ten *aurei* only. And the reason why he is understood to sue for too much is because in that kind of stipulation the promiser has his choice whether he prefers giving the money or the slave ;

¹ IV. 6. 31. The text is an abridgment of D. 13. 4, “de eo quod certo loco dari oportet.”

igitur pecuniam tantum, vel hominem tantum sibi dari oportere intendit, eripit electionem adversario, et eo modo suam quidem meliorem condicionem facit, adversarii vero sui deteriorem¹. qua de causa talis in ea re prodita est actio, ut quis intendat hominem Stichum aut aureos decem sibi dari oportere, id est ut eodem modo peteret quo sibi stipulatus est. praeterea si quis generaliter hominem stipulatus sit et specialiter Stichum petat, aut generaliter vinum stipulatus specialiter Campanum petat, aut generaliter purpuram stipulatus sit, deinde specialiter Tyriam petat: plus petere intellegitur, quia electionem adversario tollit, cui stipulationis iure liberum fuit aliud solvere quam quod peteretur. quinetiam licet vilissimum sit quod quis petat, nihilominus plus petere intellegitur: quia saepe accidit, ut promissori facilius sit illud solvere quod maioris pretii est.—Sed haec quidem antea in usu fuerant; postea autem lex Zenoniana² et nostra³ rem coartavit et si quidem tempore plus fuerit peti-

he therefore who makes a declaration that the money only or the slave only ought to be given to him deprives his opponent of his right of election, and in this manner improves his own position and damages that of his opponent¹. Wherefore a form of action is provided for such a case, enabling the plaintiff to declare that the slave Stichus or the ten *aurei* ought to be given him, that is, to sue in the same form in which he made his stipulation. Besides, if a person having stipulated in general terms for a slave, sues specifically for Stichus; or having stipulated in general terms for wine, sues specifically for Campanian wine; or having stipulated in general terms for purple cloth, sues specifically for Tyrian cloth, he is understood to sue for too much; because he deprives his opponent of his right of election, who was entitled by the terms of the stipulation to transfer something other than that which was sued for. Nay, more than this, a person is held to sue for too much even though he is suing for the thing which is of the lowest value;—for it often happens that it is easier for the promiser to deliver that which is of a higher value. These then were the rules formerly in force; but afterwards the *Lex Zenoniana*² and a constitution of our own³ laid restrictions thereon, and if too much has been sued for in

¹ Gaius IV. 53 a.² C. 3. 10. 1.³ C. 3. 10. 2.

tum, quid statui oportet, Zenonis divae memoriae loquitur constitutio¹: sin autem quantitate vel alio modo plus fuerit petitum, omne si quid forte damnum ex hac causa acciderit, ei contra quem plus petitum fuerit, commissa tripli condemnatione, sicut supra diximus² puniatur. (34.) Si minus in intentione complexus fuerit actor quam ad eum pertineret, veluti si, cum ei decem deberentur, quinque sibi dari oportere intenderit, aut cum totus fundus eius esset, partem dimidiam suam esse petierit, sine periculo agit: in reliquum enim nihilominus iudex adversarium in eodem iudicio ei condemnat, ex constitutione divae memoriae Zenonis³. (35.) Si quis aliud pro alio intend-erit, nihil eum periclitari placet, sed in eodem iudicio⁴ cognita veritate errorem suum corrigere permittimus, veluti si is qui

respect of time, the constitution of Zeno of divine memory states what ought to be arranged¹;—but if too much has been sued for in respect of quantity or in any other way, all the resulting damage, if there happen to be any on this account, is punished, as we have stated above², by the award of treble damages in favour of him upon whom the excessive claim was made. 34. If the plaintiff has included in his plaint less than belonged to him, as, for instance, where he has declared that a sum of five *aurei* is due to him, the real amount being ten; or where he has claimed the half of an estate as his, the whole of it really belonging to him, he maintains his action without risk: for the judge in spite of his mistake condemns his opponent in the same suit to make good the remainder, in accordance with the constitution of Zeno of divine memory³. 35. Where a plaintiff claims in his plaint one thing instead of another, it is held that he is at no risk, but upon discovering the real facts we allow him to correct his mistake in the same suit⁴; as for instance where one who ought to claim the

¹ The rule of Zeno was that a person who sued too soon must wait twice the time he ought to have waited originally.

² IV. 6. 24.

³ C. 3. 10. 1. 3. The rule had formerly been that the residue could not be claimed until another Praetor

came into office. Gaius IV. 56.

⁴ We see from Gaius IV. 55 that the only innovation in the law was the permission to correct "*in eodem iudicio*." In olden times a *fresh suit* had been allowed, because in reality nothing was brought into question by the first action.

hominem Stichum petere deberet Erotem petierit, aut si quis ex testamento sibi dare oportere intenderit quod ex stipulatu debetur.

36. Sunt praeterea quaedam actiones quibus non solidum quod debetur nobis persequimur, sed modo solidum consequimur, modo minus. Ut ecce si in peculium filii servive agamus, nam si non minus in peculio sit quam persequimur, in solidum pater dominusve condemnatur: si vero minus inveniatur, hactenus condemnat iudex quatenus in peculio sit. quemadmodum autem peculium intellegi debeat, suo ordine proponemus¹. (37.) Item si de dote iudicio mulier agat, placet hactenus maritum condemnari debere quatenus facere possit, id est quatenus facultates eius patiuntur. itaque si dotis quantitati concurrant facultates eius, in solidum damnatur: si minus, in tantum quantum facere potest. Propter retentionem² quoque

slave Stichus has claimed Eros, or where a plaintiff has declared that a debt is due to him under a testament, when in fact it is due on account of a stipulation.

36. There are moreover certain actions whereby we recover not the whole of our debt, but sometimes the whole and sometimes less. For example, where we bring an action for the *peculium* of a son or slave; for if the amount of the *peculium* be not less than that of our claim, the father or the master is condemned to pay the whole; if, however, the amount of the *peculium* be found to be less than that of the claim, the judge condemns the defendant to pay to the extent of the *peculium*. But how the *peculium* is to be calculated we shall shew in the proper place¹. 37. Again, where a married woman sues for restitution of her marriage-portion, it is decided that the husband ought to be condemned to the extent of his power to pay, that is, to such an extent as his means will permit; therefore if his means are as great as the marriage-portion, the award against him is for the whole; but if his means are less than the amount of the claim, he must be condemned to pay as much as he can. The recovery of the marriage-portion is also diminished in consequence of retention²; for a retention is allowed the husband for ex-

¹ IV. 7. 4.

² See as to retention out of marriage-portions, Ulpian VI. 9—17.



dotis repetitio minuitur : nam ob impensas in res dotales factas marito retentio concessa est, quia ipso iure¹ necessariis sumptibus dos minuitur, sicut ex latioribus digestorum libris cognoscere liceat². (38.) Sed et si quis cum parente suo patronove agat³, item si socius cum socio iudicio societatis agat⁴, non plus actor consequitur quam adversarius eius facere potest⁵. idem est, si quis ex donatione sua conveniatur⁶. (39.) Compensationes quoque oppositae⁷ plerumque efficiunt, ut minus quisque consequatur quam ei debebatur : namque ex bono et aequo, habita ratione eius quod invicem actorem ex eadem causa praestare oporteret, in reliquum eum cum quo actum est condemnare, sicut iam dictum est⁸. (40.) Eum quoque qui creditoribus suis bonis cessit⁹, si postea aliquid adquisierit quod idoneum emolumentum habeat¹⁰, ex integro in id quod facere potest creditores

penses incurred in respect of the dotal property, a marriage-portion being *ipso iure*¹ diminished on account of necessary expenses, as one may discover by referring to the larger treatise, the Digest². 38. Moreover when a person sues his ascendant or his patron³, or when one partner sues another partner in the partnership action⁴, the plaintiff does not obtain more than his adversary can pay⁵; and the same rule applies to the case of a person sued upon a gift made by him⁶. 39. Mutual sets-off⁷ also frequently result in a person obtaining less than was due to him, for on principles of fairness and equity an account is taken of what the plaintiff on his side ought to pay in connection with the same transaction, and the defendant, as we have stated above, is condemned to pay the balance⁸. 40. Also when a debtor, having made a cession of his effects to his creditors⁹, has afterwards acquired something which provides and renders a considerable profit¹⁰, his creditors

¹ *Ipso iure* = "Quod ipsa legis auctoritate, absque magistratus auxilio, et sine exceptionis ope fit." Brissonius.

² D. 25. 1.

³ D. 42. 1. 17.

⁴ D. 42. 1. 16 : D. 42. 1. 22. 1.

⁵ "In condemnatione personarum quae in id quod facere possunt damnantur non totum quod habent extorquendum est, sed et ipsarum ratio

habenda est ne egeant." D. 50. 17. 173. pr.

⁶ D. 42. 1. 19. 1.

⁷ As to *Compensatio* see Gaius IV. 61—68.

⁸ IV. 6. 30.

⁹ See Gaius III. 78 and our notes thereon.

¹⁰ "Cum tantum postea quaesivit quod praesidem debeat promovere." C. 7. 72. 3. See also D. 42. 3. 6 and 7.

cum eo experiuntur: inhumanum enim erat spoliatum fortunis suis in solidum damnari,

TIT. VII. QUOD CUM EO QUI IN ALIENA POTESTATE EST
NEGOTIUM GESTUM ESSE DICETUR.

Quia tamen superius mentionem habuimus¹ de actione quae in *peculium* filiorumfamilias servorumve agitur, opus est, ut de hac actione et de ceteris quae eorundem nomine in parentes dominosve dari solent diligentius admoneamus. Et quia, sive cum servis negotium gestum sit sive cum his qui in potestate parentis sunt, fere eadem iura servantur², ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturi de liberis quoque et parentibus quorum in potestate sunt. nam si quid in his proprie observatur, separatim ostendamus,

are allowed to sue him again for such amount as he can pay; for it would be inhuman for a man who has already been deprived of his property to be condemned in the full amount,

TIT. VII. ON THE BUSINESS WITH A PERSON UNDER ANOTHER'S POTESTAS WHICH IS TO BE REGARDED AS BINDING.

As we have already mentioned¹ the action which may be brought for the *peculium* of descendants under *potestas* and of slaves, it is now necessary for us to explain more carefully the nature of this action and of others which are usually granted against parents or masters in the name of such persons. And as the rules applied are almost identical² whether the business be transacted with slaves or with those under the *potestas* of their ascendants, therefore, to avoid a prolix discussion, let us speak with reference to slave and master, with the understanding that the same rules are applicable to descendants and the ascendants under whose *potestas* they are. For if there are any special rules relating to the latter we will point them out separately.

¹ IV. 6, 8, 10, 36.

² There are a few differences, as

for example those named in III. 19, 6 and IV. 7. 7.

1. Si igitur iussu domini cum servo negotium gestum erit, in solidum Praetor adversus dominum actionem pollicetur, scilicet quia qui ita contrahit fidem domini sequi videtur¹. (2.) Eadem ratione Praetor duas alias in solidum actiones pollicetur, quarum altera exercitoria, altera institoria appellatur. Exercitoria tunc locum habet, cum quis servum suum magis-
trum navis praeposuerit, et quid cum eo eius rei gratia cui praepositus erit contractum fuerit. ideo autem exercitoria vocatur, quia exercitor² appellatur is ad quem cotidianus navis quaestus pertinet. Institoria tunc locum habet, cum quis tabernae forte aut cuilibet negotiationi servum praeposuerit, et quid cum eo³ eius rei causa cui praepositus erit contractum fuerit. ideo autem institoria appellatur, quia qui negotiationibus praepouuntur institores vocantur. Istas tamen duas actiones Praetor reddit, etsi liberum quis hominem aut alienum servum

1. If then any business have been entered into with a slave by the express command of his master, the Praetor promises an action for the full amount against the master; obviously on the ground that a person who enters into such an engagement seems to trust to the master's credit¹. 2. On the same principle the Praetor also promises two other actions for the full amount, one of which is called "exercitorian," and the other "institorian." The former is applicable when any one has appointed his slave captain of a vessel, and some contract has been made with him in reference to the business which he was appointed to manage. The reason why the action is called "exercitorian" is because the name *exercitor*² is given to the person to whom the daily profits of a vessel accrue. The "institorian" action can be used when a person has placed his slave to manage a shop or a business of any kind, and some contract has been made with him³ in reference to the business he has been set to manage. It derives its name "institorian" from the fact that persons appointed to manage a business are styled *institores*. The Praetor, however, grants these two actions also in the case where anyone appoints a

¹ Gaius IV. 70.

² An *exercitor* was not necessarily the owner of a vessel, but might be

a charterer. See D. 14. 1. 1. 15.

³ Or with his servants or apprentices. See D. 14. 3. 3; D. 14. 3. 8.

navi aut tabernae aut cuilibet negotiationi praeposuerit, scilicet quia eadem aequitatis ratio etiam eo casu interveniebat¹.

3. Introduxit et aliam actionem Praetor quae tributoria vocatur. Namque si servus in peculiari merce sciente domino negotietur, et quid cum eo eius rei causa contractum erit, ita Praetor ius dicit, ut quicquid in his mercibus erit, quodque inde receptum erit, id inter dominum, si quid ei debebitur, et ceteros creditores pro rata portione distribuatur. et quia ipsi domino distributionem permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit quam oportuerit, hanc ei actionem accommodat, quae tributoria appellatur.

4. Praeterea introducta est actio de peculio deque eo quod in rem domini versum erit, ut quamvis sine voluntate domini negotium gestum erit, tamen sive quid in rem eius versum fuerit, id totum praestare debeat, sive quid non sit in rem

free person, or the slave of another man to manage a ship, or shop, or any business, obviously because the same principle of equity applies to this case also¹.

3. The Praetor has also introduced another action, called the "tributorian." For if a slave trade with the merchandise belonging to his *peculium* with the knowledge of his master, and any contract be made with him in connection with the same, the rule ordained by the Praetor is that all the stock comprised in this merchandise, and all profit derived therefrom, shall be divided between the master, if anything be due to him, and the other creditors, in proportion to their claims. And as the Praetor entrusts the distribution to the master himself, therefore in case of complaint being made by any one of the creditors that his share is smaller than it ought to be, he gives this creditor the action called "tributorian."

4. In addition, an action has been introduced "relating to the *peculium*, and to whatever has been converted to the profit of the master;" so that even though the transaction in question has been entered into without the wish of the master, yet if, on the one hand, anything has been converted to his profit, he is bound to make satisfaction to the full amount of that profit; and if, on the other hand, there has been no profit to him, he is still bound to make satisfaction

¹. Gaius IV. 70.

eius versum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem domini versum intellegitur quicquid necessario in rem eius impenderit servus, veluti si mutuatus pecuniam creditoribus eius eam solverit, aut aedificia ruentia fulserit, aut familiae frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus fuerit. itaque si ex decem ut puta aureis quos servus tuus a Titio mutuos accepit creditori tuo quinque aureos solverit, reliquos vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si toti decem aurei in rem tuam versi fuerint, totos decem aureos Titium consequi posse. licet enim una est actio qua de peculio deque eo quod in rem domini versum sit agitur, tamen duas habet condemnationes. itaque iudex apud quem ea actione agitur ante dispicere solet, an in rem domini versum sit, nec aliter ad peculii aestimationem transit, quam si aut nihil in rem domini versum intellegatur, aut non totum. Cum autem

so far as the *peculium* admits. Now everything which the slave necessarily expends on the master's business is taken to be to his profit, as, for example, when the slave has borrowed money and with it paid his master's creditors, or propped up his ruinous buildings, or purchased corn for his household, or bought an estate, or anything else that was wanted. Therefore if out of ten *aurei*, for instance, which your slave has borrowed from Titius, he has paid five to a creditor of yours, and spent the other five in some way or other, you ought to be condemned to make good the whole of the last five, but the other five only so far as the *peculium* goes. Hence it appears that if the whole of the ten *aurei* have been spent upon your business, Titius is entitled to recover them all. For although there is but one and the same form of action for obtaining the *peculium* and the amount converted to the profit of the master, yet it has two awards. Therefore the judge before whom the action is tried ought first to ascertain whether anything has been converted to the profit of the master, and he can only go on to settle the amount of the *peculium* after satisfying himself that nothing, or not the whole amount in question, has been so converted. When, however,

quaeritur quantum in peculio sit, ante deducitur quicquid servus domino quive in potestate eius sit debet, et quod superest, id solum peculium intellegitur. aliquando tamen id quod ei debet servus qui in potestate domini sit non deducitur ex peculio, veluti si is in huius ipsius peculio sit. quod eo pertinet, ut si quid vicario suo servus debeat, id ex peculio eius non deducatur¹.

5. Ceterum dubium non est, quin is quoque qui iussu domini contraxerit, cuique institoria vel exercitoria actio competit, de peculio deque eo quod in rem domini versum est agere possit. sed erit stultissimus, si omitta actione qua facillime solidum ex contractu consequi possit, se ad difficultatem perducatur probandi in rem domini versum esse, vel habere servum peculium, et tantum habere, ut solidum sibi solvi possit. Is quoque cui tributoria actio competit aequae de

a question arises about the amount of the *peculium*, anything which is owed by the slave to his master or to a person under his master's *potestas* is first deducted, and the balance alone is reckoned as *peculium*. Still, sometimes what a slave owes to a person under the *potestas* of his master is not deducted, as for instance when the person to whom he owes it is a part of his own *peculium*: the meaning of which is that deduction is not made from the *peculium* on account of any debt which the slave owes to his own *vicarius* (sub-slave)¹.

5. Now there is no doubt that he who has made a contract (with a slave) at the bidding of his master, and who can avail himself of the exercitorian or institorian action, may also bring the action styled "*de peculio et in rem verso*." But he would be most foolish were he to neglect the action by which he can with the utmost facility recover the whole amount under the contract, and involve himself in the difficult task of proving that conversion has taken place to the profit of the master, or that the slave has a *peculium*, and one so great that the whole amount can be paid to him out of it. Again, he for whom a tributorian action lies can in like manner pro-

¹ If the amount had been deducted as due to the *vicarius*, the *ordinarius* could at once have resumed it as a part of the *peculium* of his

slave, thus bringing it into his own *peculium* and making the deduction nugatory.

peculio et in rem verso agere potest: sed sane huic modo tributoria expedit agere, modo de peculio et in rem verso. tributoria ideo expedit agere, quia in ea domini condicio praecipua non est, id est quod domino debetur non deducitur, sed eiusdem iuris est dominus cuius et ceteri creditores: at in actione de peculio ante deducitur quod domino debetur, et in id quod reliquum est creditori dominus condemnatur. rursus de peculio ideo expedit agere, quod in hac actione totius peculii ratio habetur, at in tributoria eius tantum quod negotiatur: et potest quisque tertia forte parte peculii aut quarta vel etiam minima negotiari, maiorem autem partem in praediis et mancipiis aut fenebri pecunia habere. prout ergo expedit, ita quisque vel hanc actionem vel illam eligere debet: certe, qui potest probare in rem domini versum esse, de in rem verso agere debet.

6. Quae diximus de servo et domino, eadem intellegimus et de filio et filia aut nepote et nepte, et patre avove cuius

ceed by the action "*de peculio et in rem verso*." but clearly it is in some cases best for him to have recourse to the tributorian action, and in others to the "*de peculio et in rem verso*." It is (sometimes) better for him to resort to the tributorian action, because in that the master is not put into a preferential position, in other words, there is no previous deduction of what is owed to him, but he stands on the same footing as the other creditors; whilst in the other action any debt due to the master is deducted in the first instance, and the master is then condemned to pay over the residue to the creditor. Again it is (at other times) expedient to proceed by the action "*de peculio*," because in this action account is taken of the whole *peculium*; whereas in the tributorian action account is taken only of the part employed in trade; and it is possible for a man to traffic with a third, it may be, or a fourth, or even a very small portion, and to have the greater part invested in land and slaves, or in money at interest. Therefore a man ought to select the one action or the other according to expediency: but clearly if he can prove that (his money) has been employed for the master's benefit, he should proceed by the action "*de in rem verso*."

6. What we have said about the slave and his master, we also consider applicable to a son and daughter, or a grand-

in potestate sunt. (7.) illud proprie servatur in eorum persona, quod senatusconsultum Macedonianum¹ prohibuit mutuas pecunias dari eis qui in parentis erunt potestate; et ei qui crediderit denegatur actio, tam adversus ipsum filium filiamve, nepotem neptemve (sive adhuc in potestate sunt, sive morte parentis vel emancipatione suae potestatis esse coeperint), quam adversus patrem avumve, sive habeat eos adhuc in potestate, sive emancipaverit. quae ideo senatus prospexit, quia saepe onerati aere alieno creditarum pecuniarum quas in luxuriam consumeabant vitae parentum insidiabantur.— (8.) Illud in summa admonendi sumus id quod iussu patris dominive contractum fuerit, quodque in rem eius versum erit, directo quoque posse a patre dominove condici, tamquam si principaliter cum ipso negotium gestum esset. ei quoque

son and granddaughter, and the father or grandfather under whose *potestas* they are. 7. The prohibition contained in the *senatusconsultum Macedonianum*¹ is separately applicable to them, viz. as to money being lent to those under *patria potestas*: and an action is refused to the lender, either against the son or daughter, grandson or granddaughter themselves (whether they be still under *potestas*, or whether by the death of their ascendant, or by emancipation they have become *sui juris*), or against the father or grandfather (whether he still have them under his *potestas* or have emancipated them). And this rule the Senate laid down, because frequently persons who were oppressed with the burden of borrowed money, which they had consumed in extravagance, plotted against the lives of their ascendants. 8. We must finally take note that when any contract has been made by the express authority of a father or master, or when anything has been applied to his benefit, a *condiction* can be brought directly against the father or master, just as though the transaction had been with him personally. So too it is ruled that a man who is liable to

¹ Tacitus assigns this *senatusconsultum* to the reign of Claudius, Suetonius to that of Vespasian. See Tac. *Ann.* XI. 13, Suet. *Vesp.* 11. Possibly it was republished in the latter reign. The words of the S. C. itself, quoted in D. 14. 6. 1, explain that

its name is derived from that of Macedo, an iniquitous usurer: Theophilus, however, says Macedo was a spendthrift borrower, who attempted to murder his father; but of course the S. C. is its own best exponent.

qui vel exercitoria vel institoria actione tenetur directo¹ posse condici placet, quia huius quoque iussu contractum intellegitur.

TIT. VIII. DE NOXALIBUS ACTIONIBUS.

Ex maleficiis servorum, veluti si furtum fecerint aut bona rapuerint aut damnum dederint aut iniuriam commiserint, noxales actiones proditae sunt, quibus domino damnato permittitur aut litis aestimationem sufferre aut hominem noxae dedere². (1.) Noxa autem est corpus quod nocuit, id est servus; noxia ipsum maleficium³, veluti furtum, damnum, rapina, iniuria. (2.) Summa autem ratione permissum est noxae deditione defungi: namque erat iniquum nequitiam

the exercitorian or institorian action may be sued directly¹ by *condiction*, because this contract too is considered to be made by his direction.

TIT. VIII. CONCERNING NOXAL ACTIONS.

For the wrongful acts of slaves, such as theft or violent robbery, or damage or injury, noxal actions have been provided, by which the master if cast in the suit is allowed either to pay the amount of damage or to give up the offender as a *noxæ*². 1. *Noxa* then is the thing which has done the hurt, that is the slave; *noxia*³ is the actual injury committed, such as theft, damage, robbery, injury. 2. The permission granted of discharging (the damage) by the noxal surrender was in strict accordance with reason; for it was inequitable that the offence

¹ Directly = "personally" in this passage, i.e. "not through intermediate persons:" see Brissonius *sub verb.*

If there was a direct action, it is hard to see why the other actions should have been invented; but possibly the explanation is that the direct action did not originally apply, and so the Praetor invented the honorary actions. Then when the scope of the direct actions was en-

larged, the Roman civilians kept up both remedies, through their innate dislike of abolition. The direct actions are mentioned in D. 12. 1. 29; D. 15. 4. 5. pr.: D. 17. 2. 84.

² D. 9. 3. 1. pr.

³ Servius *ad Virg. Aen.* I. 45; where also another definition is given, "*noxia culpa est, ... noxa poena.*"

eorum ultra ipsorum corpora dominis damnosam esse¹. (3.) Dominus noxali iudicio servi sui nomine conventus servum actori noxae dedendo liberatur. nec minus perpetuum eius dominium² a domino transfertur: si autem damnum ei cui deditus est resarcierit quaesita pecunia, auxilio Praetoris invito domino manumittetur³. (4.) Sunt autem constitutae noxales actiones aut legibus aut edicto Praetoris⁴. legibus, veluti furti lege duodecim tabularum⁵, damni iniuriae lege Aquilia⁶. edicto Praetoris, veluti iniuriarum et vi bonorum raptorum. (5.) Omnis autem noxalis actio caput sequitur⁷. nam si servus tuus noxiam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem pervenerit, cum illo incipit actio esse, aut si manumissus fuerit, directo ipse tenetur, et extinguitur noxae deditio. ex diverso quoque directa actio

of the slaves should inflict loss on their masters beyond the value of their persons¹. 3. The master who has been sued on account of his slave in a noxal action is discharged by surrendering the slave to the plaintiff as a *nox*, and the ownership² in him is for ever transferred from the master; but if the slave procures money and recoups him to whom he has been surrendered, he will be manumitted through the Praetor's aid against his master's will³. 4. Noxal actions have been established either by *leges* or by the Praetor's edict⁴. By *leges*, as the action of theft under a law of the Twelve Tables⁵, or that of wrongful damage under the Lex Aquilia⁶; by the edict of the Praetor, as the actions of injury and of robbery with violence. 5. Again every noxal action follows the person (of the delinquent)⁷; for if your slave has committed a noxal act, so long as he is under your *potestas* the action lies against you; but if he passes under the *potestas* of another; the action forthwith lies against that other; or if he has been manumitted, he is actionable personally and the possibility of giving him up as a *nox* is at an end. Conversely a direct

¹ Gaius IV. 75.

² I.e. the bonitarian ownership: see D. 9. 4. 26. 6: D. 2. 9. 2. 1: D. 41. 2. 3. 21.

³ The old master, having parted with him to avoid paying the damages, has no reversionary claim; but the new master, having received him in lieu of payment for damage

he caused, is treated to a certain extent as holding him in pledge, and therefore must free him when the pledge is redeemed by satisfaction of his claim.

⁴ Gaius IV. 76.

⁵ Tab. XII. l. 2.

⁶ IV. 3.

⁷ Gaius IV. 77.

noxalis esse incipit: nam si liber homo noxiam commiserit, et is servus tuus esse coeperit, quod casibus quibusdam effici primo libro tradidimus¹, incipit tecum esse noxalis actio, quae ante directa fuisset. (6.) Si servus domino noxiam commiserit, actio nulla nascitur: namque inter dominum et eum qui in eius potestate est nulla obligatio nasci potest². ideoque et si in alienam potestatem servus pervenerit aut manumissus fuerit, neque cum ipso, neque cum eo cuius nunc in potestate sit agi potest³. unde si alienus servus noxiam tibi commiserit, et is postea in potestate tua esse coeperit, intercidit actio, quia in eum casum deducta sit in quo consistere non potuerit; ideoque licet exierit de tua potestate, agere non potes⁴; quemadmodum si dominus in servum suum aliquid commiserit, nec si manumissus vel alienatus fuerit servus, ullam actionem contra dominum habere potest.

action may also become a noxal one; for if a free man has committed a noxal act and has afterwards become your slave, which we have shewn in the first book may be effected in certain cases¹, then the action which previously lay directly against the offender becomes a noxal action against you. 6. If a slave has committed a noxal act against his master no action results therefrom, for there can be no obligation between a master and one who is under his *potestas*². And so though the slave may have passed under the *potestas* of another, or have been manumitted, there can be no action either against him or against the person in whose *potestas* he now is³. Hence when another person's slave has committed a noxal act against you, and has subsequently passed under your *potestas*, the right of action is lost, because it is so affected by circumstances that it cannot exist: and therefore, even though the slave should pass out of your *potestas*, you cannot sue⁴: precisely as when a master has inflicted some injury upon his own slave, for not even if the slave be (afterwards) manumitted or alienated, can he have any right of action against the master.

¹ I. 3. 4; I. 16. 1.

² III. 19. 6; Gaius IV. 78.

³ D. 47. 2. 17. 1.

⁴ From the parallel passage in Gaius IV. 78 it will be seen that this

had been at one time doubted, and that Justinian adopts the view held by the school of which Gaius was a follower.

7. Sed veteres quidem haec et in *filiisfamilias* masculis et feminis admiserunt. Nova autem hominum conversatio huiusmodi asperitatem recte respuendam esse existimavit, et ab usu communi haec penitus recessit: quis enim patietur filium suum et maxime filiam in noxam alii dare, ut paene per corpus pater magis quam filius periclitetur, cum in filiabus etiam pudicitiae favor hoc bene excludit? et ideo placuit¹ in servos tantummodo noxales actiones esse proponendas², cum apud veteres legum commentatores invenimus saepius dictum ipsos filiosfamilias pro suis delictis posse conveniri³.

TIT. IX. SI QUADRUPES PAUPERIEM FECISSE DICETUR.

Animalium nomine quae ratione carent, si quidem lascivia aut fervore aut feritate pauperiem fecerint, noxalis actio lege duodecim tabularum⁴ prodita est (quae animalia si noxae de-

7. The old lawyers allowed these doctrines to apply also to a *filiusfamilias*, or *filiastfamilias*. But the sentiment of modern times has properly decided on the rejection of this severity, so that it has entirely vanished from common practice. For who would submit to the noxal surrender of his son, and still more to that of his daughter; seeing that in the person of the son the father would be in almost more misery than the son himself, whilst further a regard for modesty clearly forbids such surrender in the case of daughters? Therefore it has been settled¹ that noxal actions are to be provided² against slaves alone, since we find it often stated by ancient commentators on the laws that *filiifamiliarum* are to be sued personally for their own delicts³.

TIT. IX. IF A QUADRUPED IS ALLEGED TO HAVE DONE MISCHIEF.

By a law of the Twelve Tables⁴ a noxal action was provided for the case where animals devoid of reason have done any

¹ Probably by a constitution: but if so, no vestiges of it are extant.

² Sc. in the Praetor's edict.

³ D. 9. 4. 33 and 34. The suit would not lead immediately to restitution, but by a further *actio iudi-*

cati the injured person would compel the father to reimburse him to the value of the son's *peculium*. This seems to be implied in D. 5. 1. 57.

⁴ Tab. VIII. l. 6.

dantur, proficiunt reo ad liberationem, quia ita lex duodecim tabularum scripta est); puta si equus calcitrosus calce percusserit, aut bos cornu petere solitus petierit. Haec autem actio in his quae contra naturam moventur locum habet; ceterum si genitalis sit feritas, cessat¹. Denique si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit². *Pauperies* autem est damnum sine iniuria facientis datum: nec enim potest animal iniuriam fecisse dici, quod sensu caret. Haec, quod ad noxalem actionem pertinet.

1. Ceterum sciendum est aedilitio edicto³ prohiberi nos canem, verrem, aprum; ursum, leonem ibi habere qua vulgo iter fit; et si adversus ea factum erit, et nocitum homini libero esse dicetur⁴, quod bonum et aequum iudici videtur,

pauperies through wantonness, anger or bad temper. And if these animals are surrendered as a *nox*, they benefit the defendant by discharging him from further liability, because such is the language of the law of the Twelve Tables; for instance if a horse known to be a kicker has kicked some one, or an ox accustomed to gore has wounded some one with his horn. Now this action is allowed where the animals are excited contrary to their usual disposition, but if their savageness is congenital the action is not allowed¹.—So that if a bear has escaped from his owner and then caused an injury, its former owner cannot be sued, because ownership in a wild beast is at an end when the beast has escaped². *Pauperies* is damage unaccompanied by wrongful intent on the part of the thing causing it, for an animal cannot be said to act with wrongful intent, seeing that it is void of sense. These are (the chief points) relating to the noxal action.

1. But we must notice that by the Aedile's edict³ we are forbidden to have a dog, or a boar, whether tamed or wild, a bear or a lion in any public thoroughfare, and if in consequence of a contravention of these rules a free man is declared to have been injured⁴, the owner (of the animal) may be condemned to pay such sum as to the judge seems

¹ D. 9. 1. 1. 10.

² II. 1. 12.

³ D. 21. 1. 40. 1; D. 21. 1. 42.

⁴ If the injury resulted in death, the penalty was 200 *solidi*: see D. 21. 1. 42.

tanti dominus condemnetur, ceterarum rerum, quanti damnum datum sit, dupli. Praeter has autem aedilicias actiones et de pauperie locum habebit. numquam enim actiones, praesertim poenales, de eadem re concurrentes alia aliam consumit¹.

TIT. X. DE HIS PER QUOS AGERE POSSUMUS.

Nunc admonendi sumus agere posse quemlibet hominem aut suo nomine aut alieno. alieno, veluti procuratorio, tutorio, curatorio: cum olim² in usu fuisset alterius nomine agere non posse, nisi pro populo³, pro libertate⁴, pro tutela. praeterea lege Hostilia permissum est furti agere eorum nomine qui apud hostes essent, aut reipublicae causa abessent, qui quaeve in eorum cuius tutela essent, et quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere neque

fair and reasonable; and for injuries inflicted on other things double the amount of actual damage done. But besides these Aedilian actions, one for *pauperies* also will be allowed; for when there are concurrent actions, especially penal ones, in relation to the same matter, the employment of one never excludes that of the other¹.

TIT. X. CONCERNING THOSE THROUGH WHOM WE CAN SUE.

We must next bear in mind that any man can bring an action either in his own name or in that of another. He brings one in that of another when, for instance, he sues as a procurator, tutor, or curator; although formerly² it was not allowable for a man to sue in the name of another save in the case of a popular action³, or in defence of freedom⁴, or in the capacity of guardian. Besides by the Lex Hostilia it was allowable for a person to bring an action of theft on behalf of individuals in the hands of the enemy, or absent on the business of the republic, or on account of parties, whether male or female, who were under the tutelage of those just named. But inasmuch as there was no little inconvenience in the rule that it was not allowable to sue as plaintiff or

¹ D. 44. 7. 60; D. 50. 17. 130.
See App. P, on concurrence of actions.

² I. e. during the period of the

legis actiones, as the parallel passage of Gaius states. Gaius IV. 82.

³ Treated of in D. 47. 23.

⁴ IV. 6. 13.

excipere actionem licebat, ¹coeperunt homines per procuratores litigare: nam et morbus et aetas et necessaria peregrinatio, itemque aliae multae causae saepe hominibus impedimento sunt, quo minus rem suam ipsi exequi possint. (1.) Procurator neque certis verbis, neque praesente adversario, immo plerumque ignorante eo constituitur¹: cuicumque enim permiseris rem tuam agere aut defendere, is procurator intelligitur. (2.) Tutores et curatores quemadmodum constituentur, primo libro expositum est².

TIT. XI. DE SATISDATIONIBUS.

Satisfactionum modus alius antiquitati placuit; alium novitas per usum amplexa est. Olim enim, si in rem agebatur, satisfacere possessor compellebatur, ut si victus esset, nec rem ipsam restitueret nec litis aestimationem, potestas esset pe-

plead as defendant on behalf of another, men began to litigate through *procurators*; for disease and age and unavoidable journeys, as well as many other causes, often hinder men from being able to attend in person to their own business.

1. A *procurator*¹ is not appointed either in a set form of words or in the presence of the opposite party, nay, generally, he is so appointed without the other's knowledge: for if you have allowed any one whatever to act on your behalf or to defend you, that person is taken to be your *procurator*. 2. How *tutors* and *curators* are appointed has been explained in the first book².

TIT. XI. ON THE PROVIDING OF SURETIES.

One system of providing sureties was in vogue amongst the ancients, another owes its introduction to modern usage. For in old times, in the case of proceedings *in rem*, the possessor of the thing was compelled to find sureties, so that, if he lost the suit and neither delivered up the thing itself nor paid its assessed value, the claimant might have the ability

¹ The *cognitor*, the earlier variety of agent, was assigned in a set form of words, in court and in the presence of the party against

whom he was to act. See Gaius IV. 83.

² I. 13-20.

titori aut cum eo agendi aut cum fideiussonibus eius¹. quae satisfactio appellatur iudicatum solvi: unde autem sic appellatur, facile est intellegere; namque stipulabatur quis, ut solveretur sibi quod fuerit iudicatum. Multo magis is qui in rem actione conveniebatur satisfacere cogeatur, si alieno nomine iudicium accipiebat². Ipse autem qui in rem agebat, si suo nomine petebat, satisfacere non cogeatur. Procurator vero si in rem agebat, satisfacere iubebatur ratam rem dominum habiturum³: periculum enim erat, ne iterum dominus de eadem re experiat⁴. Tutores et curatores eodem modo quo et procuratores satisfacere debere verba edicti faciebant⁵. sed aliquando his agentibus satisfactio remittebatur⁶. Haec ita erant, si in rem agebatur.

1. Sin vero in personam, ab actoris quidem parte eadem obtinebant quae diximus in actione qua in rem agitur. Ab eius vero parte cum quo agitur, si quidem alieno

to sue either him or his sureties¹. This kind of security was called *iudicatum solvi*; and the derivation of the term it is easy to understand; for a person stipulated that his opponent should pay him the amount adjudged. A fortiori was the defendant in an action *in rem* compelled to find sureties when he accepted service in another's name². But where the plaintiff in an action *in rem* sued in his own name he was not compelled to furnish sureties: although where a *procurator* brought an action *in rem* he was ordered to find sureties "that his principal would ratify his proceedings³," for there was a risk of the principal suing again for the same thing⁴. Tutors and curators, in accordance with the directions of the edict⁵, were bound to provide sureties in the same way as procurators. But sometimes the necessity for finding sureties was remitted in cases where they were plaintiffs⁶. The above principles only applied to actions *in rem*.

1. But when the action was *in personam*, so far as the plaintiff was concerned the same rules were applicable as those we have stated above in respect of the action *in rem*. But with regard to the defendant,—when a man defended in

¹ Gaius IV. 89.

² Gaius IV. 90.

³ Cic. *pro Quint.* 7, 8.

⁴ Gaius IV. 96, 98.

⁵ Quoted in D. 3. 3. 33. 3.

⁶ Gaius IV. 99.

nomine aliquis interveniret, omnimodo satisfaceret, quia nemo defensor in aliena re sine satisfactione idoneus esse creditur¹. quodsi proprio nomine aliquis iudicium accipiebat in personam, iudicatum solvi satisfacere non cogebatur².

2. Sed haec hodie aliter observantur. Sive enim quis in rem actione convenitur sive personali suo nomine: nullam satisfactionem pro litis aestimatione dare compellitur, sed pro sua tantum persona, quod in iudicio permaneat usque ad terminum litis, vel committitur suae promissioni cum iureiurando (quam iuratoriam cautionem vocant), vel nudam promissionem vel satisfactionem pro qualitate personae suae dare compellitur³. (3.) Sin autem per procuratorem lis vel infertur vel suscipitur: in actoris quidem persona, si non mandatum actis insinuatum est, vel praesens dominus litis in iudicio procuratoris sui personam confirmaverit, ratam rem

another's name he was always obliged to furnish sureties, because no one is considered competent to take up another's defence unless there be sureties¹. On the other hand when a man was defendant on his own account in an action *in personam* he had not to find sureties for payment of the award².

2. At the present time, however, the practice is different; for where a person is sued in his own name, whether the proceedings be *in rem* or *in personam*, he is not forced to give any security for the value of the thing in dispute, but only for his own person, that is, to remain in court until the termination of the suit; which is effected either by exacting a promise from him with an oath attached to it, called the juratory security; or by compelling him to give his bare promise or sureties in proportion to his quality and position³. 3. When, however, a suit is instituted or defended by a *procurator*; if he be acting as plaintiff, and his commission has not been registered, or the principal in the suit has not appeared in court and confirmed the appointment of his *pro-*

¹ Gaius IV. 100, 101. As to the maxim "nemo defensor idoneus &c." see D. 3. 3. 46. 2; D. 46. 7. 10; D. 50. 17. 166.

² This does not agree with what Gaius says in IV. 102.

³ C. 12. 1. 17.

dominum habiturum satisfactionem procurator dare compellitur; eodem observando et si tutor vel curator vel aliae tales personae¹ quae alienarum rerum gubernationem receperunt litem quibusdam per alium inferunt. (4) Sin vero aliquis convenitur: si quidem praesens procuratorem dare paratus est, potest vel ipse in iudicium venire et sui procuratoris personam per iudicatum solvi satisfactionis sollemnes stipulationes firmare, vel extra iudicium satisfactionem exponere per quam ipse sui procuratoris fideiussor existit pro omnibus iudicatum solvi satisfactionis clausulis*. ubi et de hypotheca suarum rerum convenire compellitur, sive in iudicio pro-

curator, the *procurator* himself is obliged to give sureties that the principal will ratify his proceedings; and the same rule must be observed in the case of a tutor, or curator, or other persons of like character¹ who have undertaken the management of another man's business, bringing a suit against anybody through an agent. 4. But if any one be made a defendant, then supposing he is at hand and prepared to assign a *procurator*, he can either appear personally before the court and warrant the authority of his *procurator* by entering into the formal stipulatory agreements for "paying the amount adjudged," or he can out of court enter into the security by which he himself becomes *fideiussor* for his *procurator* as to all the clauses of the guarantee "for payment of the amount adjudged." And hereby he is compelled to put all his property under mortgage, whether he has made his promise in

¹ Such as fathers, C. 6. 60. 1; husbands, C. 5. 14. 11; syndics of corporations, D. 3. 4. 1. 1; heads of orphan asylums, C. 1. 3. 32; ecclesiastical bursars, C. 1. 2. 14.

* In the last-named case the *procurator* binds himself by the stipulation, and the principal guarantees that he shall fulfil his undertaking.

"Iudicatum solvi stipulatio tres clausulas in unum collatas habet: de re iudicata, de re defendenda, de dolo malo:" D. 46. 7. 6. The three objects at which the *stipulatio* aimed were these, (1) to secure pay-

ment of the award of the judge, the *litis aestimatio*, in case of non-restitution of the subject of the suit, the *lis*: (2) to secure the attendance of the defendant in court: (3) to prevent any acts being done by him to the detriment of the subject of the suit. The plaintiff, if successful, could of course sue on his judgment, by *pignoris capio* for instance; but it was more convenient to sue his opponent on his stipulation; and besides, the fact of there being sureties multiplied the chances of obtaining adequate compensation.

miserit sive extra iudicium caverit, ut tam ipse quam heredes sui obligentur; alia insuper cautela vel satisfatione propter personam ipsius exponenda, quod tempore sententiae recitandae in iudicio invenietur vel si non venerit, omnia dabit fideiussor quae condemnatione continentur, nisi fuerit provocatum¹. (5.) Si vero reus praesto ex quacumque causa non fuerit, et alius velit defensionem subire, nulla differentia inter actiones in rem vel personales introducenda, potest hoc facere, ita tamen, ut satisfationem iudicatum solvi pro litis praestet aestimatione. nemo enim secundum veterem regulam (ut iam dictum est²) alienae rei sine satisfatione defensor idoneus intelligitur. (6.) Quae omnia apertius et perfectissime a cotidiano iudiciorum usu in ipsis rerum documentis apparent³. (7.) Quam formam non solum in hac regia urbe, sed et in omnibus nostris provinciis, etsi propter imperitiam aliter

court or given his security out of court, so that both he and his heirs are under obligation: and he has further to provide another guarantee or security for his own person, i.e. that he will be found in court at the time when judgment has to be given, or that in case of his non-appearance his *fidejussor* will pay all that is comprised in the award, unless there be an appeal¹. 5. If, however, the defendant from some cause or other be not at hand, and another person be willing to undertake the defence, he can do so (and no distinction is to be made between actions real and personal), provided always that he provides the security "for payment of the award" according to the value of the article in dispute. For according to the old rule, as we have already stated², no one is considered competent to conduct another's defence unless sureties be provided. 6. All these matters can be understood more clearly and completely from the daily practice of the courts, and from the actual procedure in the cases³. 7. These rules we order to be observed not only here in our royal city, but in all our provinces, although from want of acquaintance with practice

¹ When the execution of the judgment is suspended by an appeal, the enforcement of the security is necessarily suspended also. D. 46. 7. 20.

² IV. II. I.

³ Several MSS. have "*argumentis*" instead of "*documentis*," and *argumenta* is used in the Prooemium, § 3, to signify procedure.

forte celebrabantur obtinere censemus, cum necesse est omnes provincias caput omnium nostrarum civitatum, id est hanc regiam urbem eiusque observantiam sequi.

TIT. XII. DE PERPETUIS ET TEMPORALIBUS ACTIONIBUS ET
QUAE AD HEREDES VEL IN HEREDES TRANSEUNT.

Hoc loco admonendi sumus, eas quidem actiones quae ex lege senatusveconsulto sive ex sacris constitutionibus profiscuntur, perpetuo solere antiquitus competere¹, donec sacrae constitutiones tam in rem quam in personalibus actionibus certos fines dederunt: eas vero quae ex propria Praetoris iurisdictione pendent plerumque intra annum vivere (nam et ipsius Praetoris intra annum erat imperium). aliquando tamen

other methods of procedure were perhaps once employed; for it is necessary that all our provinces follow the rules that obtain in the head of all our civic corporations, viz. this royal city.

TIT. XII. CONCERNING PERPETUAL AND TEMPORARY ACTIONS
AND SUCH AS ARE TRANSMISSIBLE TO AND AGAINST HEIRS.

At this point we must be reminded that the ancient practice was to allow at any time¹ those actions which arise from a *lex*, or a *senatusconsultum*, or the imperial constitutions, until the imperial constitutions fixed certain limitations for actions, both those *in rem* and those *in personam*; whereas those which originate from the special jurisdiction of the Praetor generally are available within the year, because the authority of the Praetor used to last for that time. Sometimes, however,

¹ The Praetor granted these actions any length of time after the ground of action: the others he only allowed if proceedings were commenced within one year. It was very likely that the rule originally was that they could only be instituted whilst the same Praetor was in office whose year had witnessed the offence; but subsequently the space of time became a definite one and irrespective

of the possible retirement of one Praetor and succession of another. After the legislation of Theodosius *perpetuum* came to have a restricted meaning, and a *perpetua actio* was one which could be brought within 30, or in some cases (e.g. the *actio hypothecaria*) within 40 years, and no action was thenceforward actually "perpetual," C. 7. 39. 3; C. 7. 39. 7.

et in perpetuum extenduntur, id est usque ad finem constitutionibus introductum; quales sunt hae quas bonorum possessori ceterisque qui heredis loco sunt¹ accommodat. furti quoque manifesti actio², quamvis ex ipsius Praetoris iurisdictione proficiscatur, tamen perpetuo datur: absurdum enim esse existimavit anno eam terminari³.

1. Non autem omnes actiones quae in aliquem aut ipso iure competunt aut a Praetore dantur, et in heredem aequè competunt aut dari solent. est enim certissima iuris regula, ex maleficiis poenales actiones in heredem non competere, veluti furti, vi bonorum raptorum, iniuriarum, damni iniuriae. sed heredibus huiusmodi actiones competunt, nec denegantur, excepta iniuriarum actione⁴, et si qua alia similis inveniatur.

they are extended *in perpetuum*, that is, up to the limit introduced by the constitutions: such are the actions which the Praetor grants to the *bonorum possessor* and to the others who occupy the position of heir¹. The action of manifest theft also², though issuing from the Praetor's jurisdiction, is granted at any time; for he held it absurd that it should be limited to the duration of a year³.

1. But not every action which is either maintainable by strict law or granted by the Praetor against an individual is equally maintainable or granted against his heir. For there is a firmly established rule of law that penal actions or delicts do not lie against the heir of the offender, for instance, the actions of theft, of violent robbery, of injury, of wrongful damage; but actions of this kind lie for the heir (of the person aggrieved) and are not refused to him, except the action of injury⁴ and any other

¹ The *bonorum emptor*, for instance; see Gaius IV. 35, "similiter et bonorum emptor ficto se herede agit."

² IV. 1. 3.

³ Gaius gives a more satisfactory explanation, viz. that "the Praetor's pecuniary penalty had been merely substituted for the capital penalty under a law of the Twelve Tables," and this latter arising from a *lex* was, of course, perpetual. Gaius IV. III. The general rule seems to have been that Praetorian actions

for restitution were perpetual; those for a penalty annual. Also that annual actions did not lie against the heir of the delinquent, except to such extent as he had benefited by the wrong. The penal action for theft was an exception as to duration, but if brought against the heir was only for the amount of his profit. Hence being in the latter case for restitution only, it then falls within the first rule.

⁴ The reason for this is that the *actio iniuriarum* was regarded by

adipiendo tamen etiam ex contractu actio contra heredem non competit, cum testator dolose versatus sit et ad heredem eius nihil ex eo dolo pervenerit¹. poenales autem actiones quas supra diximus, si ab ipsis principalibus personis fuerint contestatae², et heredibus dantur, et contra heredes transeunt.

2. Superest ut admoneamus, quod si ante rem indicatam is cum quo actum est satisfaciatur actori, officio iudicis convenit eum absolvere, licet iudicii accipiendi tempore in ea

action that can be found to resemble it. Sometimes, however, even an action on a contract does not lie against the heir of a party, where a testator has acted fraudulently and his heir has obtained no advantage from the fraud¹. But the above-mentioned penal actions, if carried on by the principals as far as the *litis contestatio*², are allowed to the heirs (of the injured party) and survive against the heirs (of the injurer).

2. Finally, we must remind you that if before the award is given the defendant make satisfaction to the plaintiff, it is the duty of the judge to acquit him, although at the time of accepting the issue (referred to the judge), he was so situated

the Roman law as a purely personal remedy; "the heir had suffered no wrong," says Ulpian in D. 47. 10. 13. pr., and Paulus, referring to a similar case, says the original action is "*vindictae non pecuniae*," D. 37. 6. 2. 4. But we learn from the passage of Ulpian just quoted, that if the proceedings had reached the *litis contestatio* in the lifetime of the aggrieved party, they could be continued by his heir. Other actions of like kind are those of a *patronus* against a *libertus* who has sued him without the Praetor's leave, D. 2. 4. 24; those against a man who has by violence prevented an arrest, D. 2. 7. 5. 4; those against *calumniatores*, D. 3. 6. 4, &c., &c. Gaius IV. 112.

¹ This statement is in direct opposition to numerous passages in the Digest (e.g. D. 44. 7. 12 and 49, D. 50. 17. 157. 2), where we are told that actions *ex contractu* are always

maintainable against the heirs of those who have broken their contract. We can only suppose that Justinian is here speaking of cases where a contract is fulfilled to the letter, so that there is no action *ex contractu* strictly so called, but still some *dolus* is committed in the fulfilment, i.e. some inconvenience is purposely caused to the creditor, and hence there can be an action *ex dolo* (which in such an instance may somewhat loosely be called an action *ex contractu*), for this action did not pass against the heirs, unless they had benefited by the *dolus*: see D. 4. 3. 17. 1; D. 16. 3. 7. 1; D. 50. 17. 152. 3.

² The *litis contestatio* was that point in a suit where the litigation became final, so that there was no further room for compromise. This topic is treated fully by Gaius in III. 180, to which, and our notes thereon, we refer the reader. Fur-

causa fuisset, ut damnari debeat¹: et hoc est quod ante vulgo dicebatur omnia iudicia absolutoria esse.

TIT. XIII. DE EXCEPTIONIBUS.

Sequitur ut de exceptionibus dispiciamus². Comparatae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit, ut licet ipsa persecutio qua actor experitur iusta sit, tamen iniqua sit adversus eum cum quo agitur. (1.) Verbi gratia si metu coactus, aut dolo inductus, aut errore lapsus stipulanti Titio promisisti quod non debueras, palam est iure civili te obligatum esse, et actio

as to be liable to condemnation¹. Hence came the common saying "that all issues before a *judex* allow of an acquittal."

TIT. XIII. OF EXCEPTIONS.

The next matter for our consideration is that of exceptions². Exceptions then are provided for the purpose of protecting defendants; for it frequently happens that though the actual claim advanced by the plaintiff may be strictly right, yet it is inequitable as against the person sued.

1. For instance, suppose under the influence of fear or fraud or mistake, you have in a stipulatory contract with Titius promised him something which you did not owe him, it is

ther information may be found in Mackeldey's *Syst. Fur. Rom.* § 200.

¹ Because, from his own admission, as shewn by his coming to terms, he was deserving of condemnation. Gaius IV. 114.

² A defendant might reply to the plaintiff's demand in three different ways: (1) by a denial of the facts alleged, which is styled by later writers *litis contestatio mere negativa*; (2) by asserting facts which destroyed the right of action *ipso jure*, although that might originally have been well-founded, such facts for instance as payment real or fictitious (*solutio* or *acceptilatio*); of such replies the *judex* as a matter of course took notice, without any express direction in the *formula* that he should

do so: (3) by asserting facts which did not destroy the right of action *ipso jure*, but on account of which the Praetor allowed a defence, *quia iniquum foret eum condemnari*; and of these the *judex* could take no notice (except in actions *ex fide bona*), unless the cognizance of them was by the *formula* expressly given to him. Such facts, included in a *formula* by means of a special clause, were *exceptiones*. See Mackeldey, *Syst. Fur. Rom.* § 200 a, p. 206. Exceptions then were equitable defences, creatures of the formulary system, and not in existence during the period of the *legis actiones*. The importance of these distinctions was of course destroyed when all *iudicia* became *extraordinaria*. See App. Q.

qua intenditur dare te oportere efficax est: sed iniquum est te condemnari; ideoque datur tibi exceptio metus causa aut doli mali¹ aut in factum composita ad impugnandam actionem. (2.) Idem iuris est, si quis quasi credendi causa pecuniam stipulatus fuerit, neque numeraverit. nam eam pecuniam a te petere posse eum certum est; dare enim te oportet, cum ex stipulatu tenearis: sed quia iniquum est eo nomine te condemnari, placet per exceptionem pecuniae non numeratae te defendi debere², cuius tempora nos (secundum quod iam superioribus libris scriptum est⁴) constitutione nostra³ coartavimus. (3.) Praeterea debitor si pactus fuerit cum creditore, ne a se peteretur, nihilominus obligatus manet, quia pacto convento obligationes non omnimodo dissolvuntur⁵: qua de causa efficax est adversus eum actio qua actor intendit, si

clear that you have bound yourself by the civil law, and his action against you whereby it is maintained that "you ought to give him the thing" is a good one: but it is inequitable that you should be condemned to do so; therefore the exception *metus causa*, or *doli mali*¹, or one adapted to the fact, is given you for the purpose of opposing his action. 2. The same doctrine holds in the case of a person stipulating for a sum of money on the pretence of being about to advance a loan, but not actually doing so; for in such case it is clear that he can sue you for the money, since you are bound to give it him, inasmuch as you are under a stipulatory contract to do so; but as it is inequitable that you should be condemned on that score, it is held that you must be defended by the exception *non numeratae pecuniae*². But by a constitution of ours³ we have limited the time for pleading this, as we have already stated in a preceding passage⁴. 3. Moreover a debtor, in spite of having (afterwards) entered into an agreement with his creditor "that he should not be sued by him," still remains bound, because obligations are in no way dissolved by entering into an agreement⁵. Wherefore the action in which the plaintiff declares in the form: "should

¹ For the rules relating to these exceptions see D. 44. 4.

² In Gaius' time this defence was raised by the *exceptio doli*: Gaius IV. 116.

³ C. 4. 30. 14.

⁴ III. 21.

⁵ "Nuda pactio obligationem non parit, sed parit exceptionem." D. 2. 14. 7. 4. Therefore being unable to create, it is also unable to dissolve.

paret eum dare oportere. sed quia iniquum est contra pactionem eum damnari, defenditur per exceptionem pacti conventi. (4.) Aequè si debitor deferente creditore iuraverit nihil se dare oportere, adhuc obligatus permanet. sed quia iniquum est de periurio quaeri defenditur tamen per exceptionem iurisjurandi¹. In his quoque actionibus quibus in rem agitur aequè necessariae sunt exceptiones; veluti si petitor deferente possessor iuraverit eam rem suam esse, et nihilominus eandem rem petitor vindicet. licet enim verum sit quod intendit, id est rem eius esse, iniquum est tamen possessorem condemnari. (5.) Item si iudicio tecum actum fuerit, sive in rem sive in personam, nihilominus obligatio durat, et ideo ipso iure postea de eadem re adversus te agi potest; sed debes per exceptionem rei iudicatae adiuvari².

it appear that the defendant ought to give" is available against the debtor; but because it is inequitable for him to be condemned in contravention of the agreement, he defends himself by the *exceptio pacti conventi*. 4. So also does a debtor remain bound, although he has at the instance of the creditor affirmed on oath "that he ought not to give anything;" but because it is inequitable to make inquiry as to his perjury, he defends himself by the *exceptio iurisjurandi*¹. In those actions too where the proceedings are *in rem*, exceptions are equally necessary; as where at the instance of the demandant a possessor has affirmed on oath that the thing in dispute is his own, and the demandant still pursues his claim for it; for though his allegation may be true, viz. that the thing is his, still it is inequitable that the possessor should be condemned. 5. Again if legal proceedings have been taken against you, whether *in rem* or *in personam*, the obligation continues in spite of this; and consequently by the letter of the law another action can be brought against you for the same matter, but you have a right to be protected by the *exceptio rei iudicatae*².

¹ See IV. 6. 11 and notes thereon.

² In the time of Gaius actions were either *judicia legitima* or *judicia imperio continentia*; and he tells us expressly in IV. 106, 107, that a judgment, or even a *litis contestatio*, in a *judicium legitimum in personam*

was a bar *ipso jure* to further legal proceedings, so that in that case no *exceptio rei iudicatae* had to be pleaded. But in *judicia legitima in rem* or *in factum*, and in all *judicia imperio continentia*, the fresh action was allowed by the letter of the

(6.) Haec exempli causa retulisse sufficiet. Alioquin quam ex multis variisque causis exceptiones necessariae sint, ex lationibus digestorum seu pandectarum libris intellegi potest¹.

(7.) Quarum quaedam ex legibus vel ex his quae legis vicem obtinent², vel ex ipsius Praetoris iurisdictione substantiam capiunt³.

8. Appellantur autem exceptiones aliae perpetuae et peremptoriae, aliae temporales et dilatoriae⁴. (9.) Perpetuae et peremptoriae sunt quae semper agentibus obstant, et semper rem de qua agitur perimunt; qualis est exceptio doli mali, et quod metus causa factum est, et pacti conventi, cum ita

6. The above-mentioned cases will do by way of example. But through what numerous and various circumstances exceptions may be necessary, can be seen from the larger volumes of the Digests or Pandects¹. 7. Some of these exceptions derive their force from *leges* or enactments having the force of a *lex*², others from the jurisdiction of the Praetor himself³.

8. Again, exceptions are ranged under the titles of perpetual and peremptory, or temporary and dilatory⁴. 9. Perpetual and peremptory are those which are always a bar to the plaintiffs, and always put an end to the matter in dispute: such are the exceptions *doli mali*, *metus causa*, and *pacti conventi*, when the agreement has been that no claim at all

law, and so the defendant was obliged to avail himself of the above-named exception. Hence we see that the meaning of the present passage is that Justinian had applied the rules affecting *judicia imperio continentia* to the class of *judicia legitima* previously outside them.

We cannot therefore accept the ingenious hypothesis which Schrader bases on the statement of Gaius in III. 180, "ante litem contestatam dare debitorem oportere: post litem contestatam condemnari oportere:" for he takes this to signify that in ancient times "after *litis contestatio* the debtor was under obligation to submit to an *adverse* award." We see clearly that in one case at any rate even in those days a *favourable* award freed him from liability to a new suit. And

besides, "condemnari oportere" merely signifies "to submit to award," favourable or unfavourable, for every *condemnatio* contained two clauses, "(1) si paret, condemnato; (2) si non paret, absolvido." We hold that Justinian in the present passage means that there can *ipso jure* be a new action, whether the defendant has lost or won in the original suit, whereas Schrader seems to think that there could be no new action if he had been defeated.

¹ See chiefly, but by no means exclusively, D. 44. 1—4.

² Sc. *senatusconsulta*, or *constitutiones*.

³ The primary division of exceptions. Gaius IV. 118.

⁴ The secondary division. Gaius IV. 120.

convenerit ne omnino pecunia peteretur¹. (10.) Temporales atque dilatoriae sunt quae ad tempus nocent et temporis dilationem tribuunt; qualis est pacti conventi, cum convenerit ne intra certum tempus ageretur, veluti intra quinquennium. nam finito eo tempore non impeditur actor rem exequi. ergo hi quibus intra tempus agere volentibus obiiicitur exceptio aut pacti conventi aut alia similis², differre debent actionem et post tempus agere: ideo enim et dilatoriae istae exceptiones appellantur. alioquin si intra tempus egerint objectaque sit exceptio, neque eo iudicio quicquam consequerentur propter exceptionem; nec post tempus olim agere poterant, cum temere rem in iudicium deducebant et consumeabant, qua ratione rem amittebant³. Hodie autem non ita stricte haec procedere volumus, sed eum qui ante tempus pactionis vel obligationis litem inferre ausus est Zenonianae⁴.

shall be made for the money¹. 10. Temporary and dilatory exceptions are those which are detrimental for a time and afford a temporary delay; such as the exception *pacti conventi*, when the agreement has been that no action shall be brought within a certain time, as for example within five years; for on the expiration of that time the plaintiff is not prevented from recovering the thing. Therefore they who attempt to sue within the time and have either the exception *pacti conventi*, or one similar to it², pleaded against them, ought to defer their action, and sue after the time (has elapsed); hence this kind of exception is called dilatory. Otherwise if the plaintiffs commenced proceedings within the prescribed time, and the exception was pleaded, they used not to be able to gain anything by the action then on foot owing to the exception, nor could they in former days sue after the time (had elapsed), because having brought their case into court without due consideration and wasted it, they lost the object of their claim³. At the present day, however, we have decided that such strictness shall not be observed, directing that when a person has ventured to bring an action before the period fixed by the agreement or obligation, he is subject to the constitution of Zeno⁴ which

¹ Gaius IV. 121.

² See for examples IV. 13. 11 and Gaius IV. 122.

³ Gaius IV. 122, 123.

⁴ C. 3. 10. 1, referred to in IV. 6. 33.

constitutioni subiacere censemus, quam sacratissimus legislator de his qui tempore plus petierunt protulit, ut et inducias quas ipse actor sponte indulserit, vel natura actionis continet, si contempserat, in duplum habeant hi qui talem iniuriam passi sunt, et post eas finitas non aliter litem suscipiant, nisi omnes expensas litis antea acceperint, ut actores tali poena perterriti tempora litium doceantur observare. (11.) Praeterea etiam ex persona dilatoriae sunt exceptiones; quales sunt procuratoriae, veluti si per militem aut mulierem agere quis velit¹: nam militibus nec pro patre vel matre vel uxore, nec ex sacro rescripto procuratorio nomine experiri conceditur²; suis vero negotiis superesse sine offensa disciplinae possunt³. eas vero exceptiones quae olim procuratoribus propter infamiam vel

that most venerable legislator published with reference to such persons as sued for too much in point of time; so that when the plaintiff has disregarded the respite which he himself has freely granted, or which the nature of the action implies, those who have sustained such wrong shall have that respite doubled; and after it has come to an end they shall not be liable to another suit unless they have previously been paid all the expenses of the former suit; in order that plaintiffs may be taught by the terror of such a penalty to be observant of the times for bringing actions. 11. Furthermore there are exceptions dilatory on account of the person, for instance procuratorial exceptions, as in the case where some one wishes to carry on an action by the agency of a soldier or a woman¹: for soldiers are not allowed to plead as procurators though it be on behalf of a father, or mother, or wife, no not even under an imperial rescript²: but they may attend to their own affairs provided they can do so without a breach of discipline³. As to those exceptions which formerly used to be pleaded against procurators in consequence of the infamy either of their

¹ Women were forbidden to act in any legal capacity: see D. 50. 17. 2. pr., D. 3. 3. 54. This had been so in ancient times; but afterwards women were allowed at any rate to make applications to the magistrates on behalf of other people, till the misconduct of a certain Carfania caused the privilege to be with-

drawn. D. 3. 1. 1. 5.

² The magistrates were directed by a constitution of Anastatius to disregard the emperor's rescript when it was "generali juri vel utilitati publicae adversa." C. 1. 22. 6.

³ This rule is extracted from C. 2. 13. 9; just as that preceding it is from C. 2. 13. 7.

dantis vel ipsius procuratoris opponebantur, cum in iudiciis frequentari nullo perspeximus modo¹, conquiescere sanximus ne dum de his altercatur, ipsius negotii disceptatio proteletur.

TIT. XIV. DE REPLICATIONIBUS.

Interdum evenit, ut exceptio quae prima facie iusta videatur, inique noceat. Quod cum accidit, alia allegatione opus est adiuvandi actoris gratia: quae replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis². veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est ut petere creditori liceat; si agat creditor, et excipiat debitor, ut ita demum condemnetur, si non convenerit ne eam pecuniam creditor petat, nocet ei exceptio (convenit enim ita:

nominator or themselves, we, having observed that they were by no means of frequent occurrence¹ in suits, have enacted that they shall be abolished, lest the proceedings in the main business be delayed by discussions concerning them.

TIT. XIV. CONCERNING REPLICATIONS.

It sometimes happens that an exception, which at first sight appears just, unfairly prejudices the plaintiff. When this occurs another allegation is necessary in order to assist the plaintiff; and this is called a *replicatio*, because by means of it the effect of the exception is rolled back again and untied². As where a person having agreed with his debtor not to sue him for the money owed, the two have afterwards made an opposite agreement, namely, that the creditor may sue; then should he bring his action, and the debtor plead the exception that he ought only to be condemned to pay "if there have been no agreement that the creditor should not sue for the money," the exception is to his prejudice (for this was the agreement and it remains a matter of fact in

¹ Another translation suggested by Marezoll is, "were frequent beyond measure:" but this is contradictory to the words immediately preceding, "*olim* opponebantur."

Either would accord with what Amianus Marcellinus (xxx. 4) says of the degraded state of the bar in his days. See also Juvenal *passim*.

² Gaius IV. 126—129.

namque nihilominus hoc verum manet, licet postea in contrarium pacti sunt): sed quia iniquum est creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

1. Rursus interdum evenit, ut replicatio quae prima facie iusta sit, inique noceat. quod cum accidit, alia allegatione opus est adiuvandi rei gratia, quae duplicatio vocatur. (2.) Et si rursus ea prima facie iusta videatur, sed propter aliquam causam inique actori noceat, rursus allegatione alia opus est qua actor adiuvetur, quae dicitur triplicatio. (3.) Quorum omnium exceptionum usum interdum ulterius quam diximus varietas negotiorum introducit; quas omnes apertius ex latiore digestorum volumine facile est cognoscere¹.

4. Exceptiones autem quibus debitor defenditur plerumque accommodari solent etiam fideiussoribus eius: et recte, quia quod ab his petitur id ab ipso debitore peti videtur, quia mandati iudicio redditurus est eis quod hi pro eo solverint². qua

spite of the after-agreement to the contrary): still inasmuch as it is inequitable that the creditor should be kept out of his rights, a replication will be assigned him on the ground of the posterior agreement.

1. Sometimes again it happens that a replication, which at first sight is a fair one, bears unduly (on the defendant): and when this occurs there is need of another allegation for the purpose of assisting the defendant; which is called a duplication. 2. And if again this appear at first sight fair, but for some cause or other press unfairly on the plaintiff, another allegation is needed for the relief of the plaintiff; which is called a triplication. 3. The variety of business-matters has caused the use of all these exceptions to be extended sometimes even beyond what we have specified; but it is easy to comprehend more fully the whole of them by reference to the wider treatise of the Digest¹.

4. The exceptions by which the debtor is defended are in general applicable also to his fidejussors: and very properly, because what is claimed from them is considered to be claimed from the debtor himself, inasmuch as by means of an *actio mandati*² he is obliged to restore to them what they have

¹ D. 44. 1.

² III. 20. 6.

ratione et si de non petenda pecunia pactus qui cum reo fuerit, placuit perinde succurrendum esse per exceptionem pacti conventi illis quoque qui pro eo obligati essent, acsi et cum ipsis pactus esset ne ab eis ea pecunia peteretur¹. Sane quaedam exceptiones non solent his accommodari. ecce enim debitor si bonis suis cesserit², et cum eo creditor experiatur, defenditur per exceptionem, nisi bonis cesserit: sed haec exceptio fideiussoribus non datur, scilicet ideo, quia qui alios pro debitore obligat hoc maxime prospicit, ut cum facultatibus lapsus fuerit debitor, possit ab his quos pro eo obligavit suum consequi.

TIT. XV. DE INTERDICTIS.

Sequitur ut dispiciamus de interdictis, seu actionibus quae pro his exercentur. Erant autem interdicta formae atque con-

paid for him. Hence, if any one enter into an agreement with his debtor to the effect that he will not claim payment, it has been decided that those who have bound themselves on the debtor's behalf are also to be protected by the exception *pacti conventi*, just as much as if the compact not to demand payment had been made with them personally¹. Some exceptions, however, are not usually granted on behalf of fidejussors. For instance when a debtor has made a cession of his property² and the creditor sues him, he has a defence under the exception *nisi bonis cesserit*: but this exception is not granted to fidejussors, clearly because he who puts third parties under obligation on behalf of his debtor has in view most particularly the object that, should the debtor become insolvent, he may obtain his due from those whom he has bound on his behalf.

TIT. XV. ON INTERDICTS.

We have now to consider the subject of interdicts, or the actions which are employed in their stead. Interdicts then

¹ Pacts, as the excerpt in D. 2. 14. 7. 8 shews, were classified under the heads *in rem* and *in personam*. In the former the covenant was a general one, "not to sue;" in the latter it was specific, "not to sue Lucius Titius." In the former case therefore the fidejussor of Lucius

Titius could avail himself of the exceptions open to Lucius Titius himself; in the latter case he could not.

² *Cessio bonorum* is a voluntary bankruptcy, *emptio bonorum* (III. 12) is a compulsory one.

ceptiones verborum quibus Praetor aut iubebat aliquid fieri, aut fieri prohibebat. quod tunc maxime faciebat cum de possessione aut quasi possessione inter aliquos contendebatur¹.

1. Summa autem divisio interdictorum haec est, quod aut prohibitoria sunt, aut restitutoria, aut exhibitoria. prohibitoria sunt quibus vetat aliquid fieri, veluti vim sine vitio² possidenti, vel mortuum inferenti quo ei ius erat inferendi, vel in loco sacro aedificari, vel in flumine publico ripave eius aliquid fieri quo peius navigetur. restitutoria sunt quibus restitui aliquid iubet, veluti cum bonorum possessori possessionem eorum quae quis pro herede aut pro possessore³ possidet ex ea hereditate, aut cum iubet ei qui vi possessione fundi deiectus sit restitui possessionem. exhibitoria sunt

were certain set forms of words in which the Praetor used either to order something to be done, or forbid something to be done: and this he was wont more particularly to do when there was a dispute between persons as to possession or quasi-possession¹.

1. The primary division of interdicts is that they are either prohibitory, restitutory or exhibitory. Prohibitory interdicts are those in which the Praetor forbids something to be done, as, for instance, the using of force against a person who is in unimpeachable² possession, or against one who carries a dead body into a place whither he has a right to carry it; or the building on sacred ground; or the doing of anything in a public river, or upon its bank whereby the navigation will be impeded. Restitutory interdicts are those in which he orders something to be delivered up, as for instance when he orders possession to be restored to the *bonorum possessor* of the goods of the inheritance which any one is occupying as heir or as possessor³, or when he orders possession of a field to be restored to the person who has been forcibly ejected from the

¹ Possession proper can only exist in regard of corporeal things: the possession of incorporeal things, i.e. rights, such as usufruct, is no true possession; and yet it has many of the essentials of true possession, and is protected by interdicts. *Quasi-possession* is the term applied to the exercise of such

rights, and its nature is fully explained by Savigny: see his *Treatise on Possession* (Perry's translation), pp. 130—134.

² *Sine vitio* = *neque vi, neque clam, neque precario*: see Savigny *On Possession*, pp. 66, 355.

³ Gaius IV, 144.

per quae iubet exhiberi, veluti eum cuius de libertate agitur, aut libertum cui patronus operas¹ indicere velit, aut parenti liberos qui in potestate eius sunt. Sunt tamen qui putant proprie interdicta ea vocari quae prohibitoria sunt, quia interdicare est denuntiare et prohibere; restitutoria autem et exhibitoria proprie decreta vocari²: sed tamen obtinuit omnia interdicta appellari, quia inter duos dicuntur.—(2.) Sequens divisio interdictorum haec est, quod quaedam adipiscendae possessionis causa comparata sunt, quaedam retinendae, quaedam recipiendae.

3. Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, quod appellatur quorum bonorum: eiusque vis et potestas haec est, ut quod ex his bonis quisque quorum possessio alicui data est pro herede aut pro possessore possideat, id ei cui bonorum possessio data est

possession of it. Exhibitory interdicts are those by which he orders the production of a thing, as for instance that of a man whose liberty is a matter of suit, or of a freedman to whom his patron wishes to appoint his services¹, or the production to their ascendant of children under his *potestas*. Some people, however, think that those interdicts only are properly so called which are prohibitory, because "to interdict" means to denounce and prohibit; and that restitutory and exhibitory interdicts are correctly described as "decrees"; but it has become customary to call them all by the name of interdicts, because they are issued between the two parties. 2. The next division of interdicts is the following, that some are provided for the purpose of obtaining possession, some for retaining it, some for recovering it.

3. An interdict for the purpose of obtaining possession, which is styled "*Quorum bonorum*," is provided for the *bonorum possessor*: its force and effect being that a man must deliver up anything which he possesses as heir or as possessor out of the goods of which the possession has been given to

¹ *Operae* were services reserved by special agreement between the master and slave as a consideration for the manumission: whereas *obsequia* were duties attaching upon the *libertinus* by mere operation of

law, e.g. to furnish ransom for the patron if taken prisoner, to contribute to his expenses in lawsuits, to assist in furnishing a *dos* for his daughter.

² Gaius iv. 140.

restituere debeat. pro heredē autem possidere videtur qui putat se heredem esse : pro possessore is possidet qui nullo iure rem hereditariam, vel etiam totam hereditatem, sciens ad se non pertinere, possidet¹. ideo autem adipiscendae possessionis vocatur interdictum, quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem : itaque si quis adeptus possessionem amiserit eam, hoc interdictum ei inutile est. Interdictum quoque quod appellatur *Salvianum* adipiscendae possessionis causa comparatum est, eoque utitur dominus fundi de rebus coloni quas is pro mercedibus fundi pignori futuras pepigisset².

4. Retinendae possessionis causa comparata sunt interdicta uti possidetis et utrubi, cum ab utraque parte de proprietate alicuius rei controversia sit, et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit,

another. And a man is considered to possess as heir when he thinks himself heir: and to possess as possessor when without right he holds possession of any item of an inheritance or of the whole inheritance, knowing that he has no claim to it¹. The interdict is said to be for the recovery of possession, because it is only available for a man who is now for the first time endeavouring to obtain possession of a thing; and therefore if any one after obtaining possession loses it again, the interdict ceases to be of service to him. There is also another interdict, called *Salvianum*, provided for the purpose of obtaining possession, and the owner of land employs it with reference to the property of his tenant which the latter has pledged in guarantee of the rent of his farm².

4. For the purpose of retaining possession are provided the interdicts *uti possidetis* and *utrubi*, when there is claim on the part of both litigants to the ownership of an article, and the primary question for decision is which of them ought to be possessor and which plaintiff. For unless it is first settled to which of them the possession belongs, the petitory

¹ Gaius IV. 144.

² The pledge in strictness applied only to articles brought upon the land, but by special agreement

might include others also. See D. 43. 33. 1 and 2: C. 4. 65. 5: also C. 8. 15. 5.

ut alius possideat, alius a possidente petat¹. et quia longe commodius est possidere potius quam petere, ideo plerumque et fere semper ingens existit contentio de ipsa possessione². commodum autem possidendi in eo est, quod etiamsi eius res non sit qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio; propter quam causam, cum obscura sint utriusque iura, contra petitem iudicari solet. Sed interdicto quidem uti possidetis de fundi vel aedium possessione contenditur, utrobi vero interdicto de rerum mobiliu possessione. quorum vis et potestas plurimam inter se differentiam apud veteres habebat: nam uti possidetis interdicto is vincebat qui interdicti tempore possidebat, si modo nec vi nec clam nec precario nactus fuerat ab adversario possessionem, etiamsi alium vi expulerat, aut clam abripuerat alienam possessionem, aut precario rogaverat aliquem

action cannot be set on foot, because both civil and natural principles make it imperative that one person should possess and the other sue against the possessor¹. And as it is much more advantageous to possess than to sue, therefore generally, and in fact almost always, there is a great struggle for the actual possession². Now the advantage of possessing consists in this, that even though the thing be not the property of the possessor, still if the plaintiff cannot prove it to be his own, the possession remains as it was: on which account when the rights of the two parties are doubtful, it is usual for judgment to be given against the plaintiff. The interdict *uti possidetis* is employed in disputes about the possession of land or buildings, and the interdict *utrobi* in those about the possession of moveables. The force and effect of these interdicts differed greatly in ancient times: for under the interdict *uti possidetis* that litigant was victorious who held possession when the interdict was granted, provided he had obtained the possession as against his adversary neither by force, clandestinity, nor sufferance; although he might have turned out some other person by force, or secretly stolen another man's possession; or prayed as a favour from some one else that

¹ Gaius IV. 148.

² "Legitimis actionibus nemo ex his qui possessionem suam vocare

audet (utitur), sed ad interdictum venit." Festus.

ut sibi possidere liceret; utrobi vero interdicto is vincebat qui maiore parte eius anni nec vi nec clam nec precario ab adversario possidebat¹. hodie tamen aliter observatur: nam utriusque interdicti potestas, quantum ad possessionem pertinet, exaequata est, ut ille vincat et in re soli et in re mobili qui possessionem nec vi nec clam nec precario ab adversario litis contestationis tempore detinet. (5.) Possidere autem videtur quisque non solum si ipse possideat, sed et si eius nomine aliquis in possessione sit, licet is eius iuri subiectus non sit, qualis est colonus et inquilinus². per eos quoque apud quos deposuerit quis, aut quibus commodaverit, ipse possidere videtur. et hoc est quod dicitur, retinere possessionem posse aliquem per quemlibet qui eius nomine sit in possessione. quinetiam animo quoque retineri possessionem placet, id est ut quamvis neque ipse sit in possessione, neque eius

he might be allowed to hold possession: but under the interdict *utrobi* that person prevailed who held possession during the greater part of the current year without force, clandestinity, or sufferance, as against his opponent¹. But now-a-days the rule is different: for the effect of both interdicts is the same in relation to possession, so that whether as to property connected with the soil, or as to a moveable, that man is successful who at the time of the *litis contestatio* detains the article without violence, clandestinity, or sufferance, as against his adversary. 5. Again, a man is regarded as possessor not only when he possesses personally, but also when any one else is in possession in his name, even though he be not subject to his authority, as a tenant of land or of a house². A man is also considered to have personal possession by means of those with whom he has deposited anything, or to whom he has lent anything; and this is the meaning of the dictum "that a man can retain possession by means of any one who is in possession in his name." Moreover it is admitted that possession is retained even by intent, that is to say, that although a person may neither be in possession himself,

¹ Gaius IV. 149, 150.

² "Allud est possidere, longe aliud in possessione esse," D. 41. 2. 10. 1. See also D. 39. 3. 7. pr. In fact *one in possession* denotes the mere fact of detention, *possidere* that the

detention is protected by means of interdicts: hence a tenant is "in possession," whereas his landlord "possesses." See Savigny *On Possession*, translated by Perry, Bk I. §7.

nomine alius, tamen, si non relinquendae possessionis animo, sed postea reversurus inde discesserit, retinere possessionem videtur. adipisci vero possessionem per quos aliquis potest, secundo libro exposuimus. nec ulla dubitatio est, quin animo solo possessionem adipisci nemo potest¹.

6. Reciperandae possessionis causa solet interdicti, si quis ex possessione fundi vel aedium vi deiectus fuerit. nam ei proponitur interdictum unde vi per quod is qui deiecit cogitur ei restituere possessionem, licet is ab eo qui vi deiecit, vi vel clam vel precario possidebat². Sed ex sacris constitutionibus³, ut supra diximus⁴, si quis rem per vim occupaverit,

nor any one else in his name, he is nevertheless considered to retain the possession if he remove from the thing without an intention of abandoning it, but purposing to return again. In our second book we have explained through what persons one can acquire possession; and there is no doubt that one cannot obtain possession by mere intent¹.

6. An interdict for the purpose of recovering possession is granted when any one has been forcibly ejected from the possession of land or a house: for on his behalf is set forth the interdict *unde vi*, by means of which the ejector is compelled to restore the possession to him, even though he himself obtained the possession by force, clandestinity, or sufferance, from the ejector². And by certain imperial constitutions³, as we have stated above⁴, when any one has

¹ Savigny holds that possession is *acquired* by a conjunction of three elements, (1) the physical power of dealing with a thing and of preventing others doing so, (2) a knowledge that we have this power, (3) an intent to use it as owners of the thing and not for another's benefit. If we hold the thing with the intent of giving the ownership to another, that other acquires through us a derivative possession, and we have merely detention. The first two elements make up the *factum*, the latter is the *animus*.

Possession, he says, is *retained* by the same conjunction of *animus* and

factum, but neither need be so strongly developed as for acquisition. There need not be an active will to hold the thing, but the mere absence of any wish to cease to hold it is enough; and the *factum* is not the absolute power to deal with the thing, but the ability to reproduce that power at pleasure, coupled with a knowledge that we have such power of reproduction. See Savigny's *Treatise on Possession*, translated by Perry, *passim*.

² In Gaius' time the rule was different: see Gaius IV. 154.

³ C. 8. 4. 7, &c.

⁴ IV. 2. 1.

si quidem in bonis eius est, dominio eius privatur, si aliena, post eius restitutionem etiam aestimationem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim deiecerit tenetur lege Iulia de vi privata aut de vi publica¹; sed de vi privata, si sine armis vim fecerit, sin autem cum armis eum de possessione expulerit, de vi publica. armorum autem appellatione non solum scuta et gladios et galeas significari intellegimus, sed et fustes et lapides.

7. Tertia divisio interdictorum haec est, quod aut simplicia sunt aut duplicia. simplicia sunt veluti in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria. namque actor est qui desiderat aut exhiberi aut restitui, reus is a quo desideratur ut restituat aut exhibeat. prohibitoriorum autem interdictorum alia simplicia sunt, alia duplicia. simplicia sunt, veluti cum prohibet Praetor in loco sacro vel in flumine publico ripave eius aliquid

forcibly seized upon anything, he is deprived of the ownership thereof, if it be a part of his own property; but if it be the property of another person, he is, after restoring it, compelled further to pay its value to the person who suffered the violence. He who has expelled another by force from his possession is also liable under the Lex Julia "de vi publica aut privata"¹: for private violence, when he has committed his violence without arms; but for public violence, when he has expelled the other from possession by means of arms. And under the description of arms we understand not only shields and swords and helmets, but also clubs and stones.

7. A third division of interdicts is this, that they are either simple or double. The simple are those where one party is plaintiff and the other defendant: of which kind are all restitutory and exhibitory interdicts: for the plaintiff is he who requests that something may be produced or restored, and the defendant is he at whose hands the production or restoration is required. But of prohibitory interdicts some are double and some are simple. They are simple, for instance, when the Praetor forbids something to be done in a sacred place, or in a public river or on its bank, for the plaintiff is he who desires

¹ IV. 18. 8.

fieri: nam actor est qui desiderat ne quid fiat; reus qui aliquid facere conatur. duplicia sunt, veluti uti possidetis interdictum et utrubi. ideo autem duplicia vocantur, quia par utriusque litigatoris in his condicio est, nec quisquam praecipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partem sustinet¹.

8. De ordine et veteri exitu interdictorum supervacuum est hodie dicere: nam quotiens extra ordinem ius dicitur² (qualia sunt hodie omnia iudicia), non est necesse reddi interdictum, sed perinde iudicatur sine interdictis, atque si utilis actio ex causa interdicti reddita fuisset.

TIT. XVI. DE POENA TEMERE LITIGANTIIUM.

Nunc admonendi sumus magnam curam egisse eos qui iura sustinebant³, ne facile homines ad litigandum procederent; quod et nobis studio est. Idque eo maxime fieri potest,

that the thing be not done, and the defendant is he who attempts to do it: they are double in such examples as the interdicts *uti possidetis* and *utrubi*; which are called double from the fact that in these the position of each litigant is the same, and that neither is regarded as specially defendant or plaintiff, but each sustains the character of defendant and plaintiff at once¹.

8. Of the process and effect of interdicts in the olden time it is superfluous now to speak; for whenever the method of decision is extraordinary² (and all actions are now of this character), it is unnecessary for an interdict to be issued, but judgment is given without interdicts, as though an *utilis actio* had been granted upon an interdict.

TIT. XVI. ON THE PENALTIES FOR RASH LITIGATION.

We must now be reminded that they who established our rights³ have taken great care to provide against persons entering into litigation too easily; and this is our aim also. Which

¹ Gaius IV. 156—160.

² See App. Q.

³ οἱ τοὺς νόμους ἡμῶν καταστή-

σαντες καὶ ἐνόητες, as Theophilus paraphrases it.

quod temeritas tam agentium, quam eorum cum quibus ageretur, modo pecuniaria poena, modo iurisiurandi religione, modo metu infamiae coercetur¹. (1.) Ecce enim iusiurandum omnibus qui conveniuntur ex nostra constitutione² defertur: nam reus non aliter suis allegationibus utitur, nisi prius iuraverit, quod putans se bona instantia uti ad contradicendum pervenit. at adversus infitiantes ex quibusdam causis dupli vel tripli³ actio constituitur, veluti si damni iniuriæ, aut legatorum locis venerabilibus relictorum nomine agetur. statim autem ab initio pluris quam simpli est actio, veluti furti manifesti quadrupli, nec manifesti dupli: nam ex his causis et aliis quibusdam⁴ sive quis neget sive fateatur, pluris quam simpli est actio.

Item actoris quoque calumnia coercetur: nam etiam actor

end can best be attained by restraints being imposed upon the litigious spirit, whether of plaintiffs or of defendants, either by a pecuniary penalty, or by the solemnity of an oath or by the fear of infamy¹. 1. For instance an oath is imposed on all defendants by one of our own constitutions²; for a defendant is allowed to put forward his pleas only after having first sworn that he is proceeding to resistance under the impression that he is employing a valid defence. And in certain cases the action is laid for double or treble³ damages against defendants who deny their liability; for example, when an action is brought on account of wrongful damage or for legacies left to sacred places. An action may also from the very outset be for more than the simple amount of damage, as the fourfold action for manifest theft, or the twofold action for non-manifest theft; for in these instances and certain others⁴ the proceedings are to recover more than the precise damage, whether the defendant deny or admit his liability. So too vexatious proceedings on the part of the plaintiff

¹ Gaius gives a very clear and complete account of the ancient provisions in IV. 174—181.

² This constitution is no longer in existence.

³ There seems to be little or no authority for this statement about treble damages; for the actions *furti concepti* and *furti oblati* were

for the treble amount, whether the defendant admitted or denied his liability; and Gaius, in IV. 171, speaks of denial doubling (but never trebling) the damages.

⁴ E.g. the *actio vi bonorum raptorum*, IV. 2; or *servi corrupti*, IV. 6. 26.

pro calumnia iurare cogitur ex nostra constitutione¹. Utriusque etiam partis advocati iusiurandum subeunt, quod alia nostra constitutione² comprehensum est. Haec autem omnia pro veteris calumniae actione introducta sunt, quae in desuetudinem abiit³, quia in partem decimam litis actorem multabat⁴, quod nusquam factum esse invenimus; sed pro his introductum est et praefatum iusiurandum, et ut improbus litigator etiam damnum et impensas litis inferre adversario suo cogatur.

2. Ex quibusdam iudiciis damnati ignominiosi fiunt, veluti furti, vi bonorum raptorum, iniuriarum, de dolo, item tutelae, mandati, depositi, directis non contrariis actionibus⁵; item pro socio, quae ab utraque parte directa est (et ob id qui

are restrained; for the plaintiff also by a constitution of ours¹ is forced to take the oath against litigiousness; and so again do the advocates of each party submit to the oath set out in another of our constitutions². All these regulations have been introduced to take the place of the old action for vexatious proceedings, which has gone into disuse³, because it mulcted plaintiffs to the extent of a tenth part of the matter in dispute⁴, and yet we find this was never exacted: so instead of that process there has been introduced the above-mentioned oath, and the rule that mischievous suitors shall be compelled to pay to their adversary his damage and the expenses of the suit.

2. In some classes of actions the defendants become infamous if the award goes against them; as, for instance, in the actions of theft, robbery with violence, injury, fraud; also in the direct actions upon guardianship, mandate and deposit, though not in the cross-actions⁵; also in the action of partnership, which is direct by whichever partner it be brought, and

¹ The one above alluded to.

² C. 2. 59. 2. pr. But the oath was no novelty, being referred to, for instance, in Cic. *pro Q. Roscio* 1.

³ At what precise time is not clear. It was in use in the days of the Emperors Diocletian and Maximian, as we see from Cod. Hermog. v. 3.

⁴ Gaius IV. 175, 178.

⁵ The direct actions are by the

pupil against his guardian, the mandator against the mandatee, and the depositor against the depositary: the cross-actions are by the guardian against the ward, &c.: and the reason why no ignominy attaches to an adverse award in the cross-action is that it raises no question of fraud or bad faith, but only a question of account and calculation. D. 3. 2. 6. 7.

libet ex sociis eo iudicio damnatus ignominia notatur). sed furti quidem, aut vi bonorum raptorum, aut iniuriarum, aut de dolo, non solum damnati notantur ignominia, sed etiam pacti¹, et recte: plurimum enim interest utrum ex delicto aliquis, an ex contractu debitor sit.

3. Omnium autem actionum instituendarum principium ab ea parte edicti proficiscitur qua Praetor edicit de in ius vocando: utique enim in primis adversarius in ius vocandus est², id est ad eum vocandus est qui ius dicturus sit. Qua parte Praetor parentibus et patronis, item liberis parentibusque patronorum et patronarum hunc praestat honorem, ut non aliter liceat liberis libertisque eos in ius vocare, quam si id ab ipso Praetore postulaverint et impetraverint³; et si quis aliter vocaverit, in eum poenam solidorum quinquaginta constituit.

therefore either of the partners is branded with infamy if the decision be against him in the suit. But in the action of theft, or robbery with violence, or injury or fraud, not only are those branded with infamy who suffer an adverse verdict, but those also who have bought off (their adversary)¹; and rightly so, for there is a wide difference between being debtor by reason of a delict or by reason of a contract.

3. The first step in commencing any action is founded on that part of the edict in which the Praetor gives directions concerning the summoning into court; for undoubtedly the primary proceeding is for the opponent to be summoned into court², that is to be summoned before the official who is to pronounce the law. And in that part (of the edict) the Praetor grants this privilege to ascendants and patrons, as well as to the descendants and ascendants of patrons, whether male or female, that their descendants or freedmen are not allowed to summon them into court, unless they have requested and obtained permission to do so from the Praetor himself³: and when any such person has summoned them otherwise, he imposes upon him a penalty of fifty *solidi*.

¹ This is the meaning of *pacti* (*sunt*): see D. 3. 2. 6. 3. When the suit was compromised by leave of the Praetor, or when the plaintiff withdrew it without reward, there was

no ignominy. See also C. 2. 12. 18.

² "Jus dicitur locus in quo jus redditur." D. 1. 1. 11.

³ IV. 6. 12; Gaius IV. 183; D. 2. 4. 1.

TIT. XVII. DE OFFICIO IUDICIS.

Superest ut de officio iudicis¹ dispiciamus. Et quidem in primis illud observare debet iudex, ne aliter iudicet quam legibus aut constitutionibus aut moribus proditum est². (1.) Ideo si noxali iudicio addictus est, observare debet, ut si condemnandus videbitur dominus³, ita debeat condemnare: Publium Maevium Lucio Titio decem aureis condemno, aut noxam dedere⁴. (2.) Et si in rem actum sit, sive contra petito rem iudicabit, absolvere debet possessorem, sive contra possessorem, iubere eum debet, ut rem ipsam restituat cum fructibus. Sed si in praesenti neget se possessor restituere posse, et sine frustratione videbitur tempus resti-

TIT. XVII. ON THE DUTY OF A JUDGE.

It remains for us to treat of the duty of a judge¹. And above all things a judge ought to take care not to decide otherwise than according to what is laid down by the *leges*, the constitutions or the customs². 1. Therefore if a judge has been assigned for the trial of a noxal action, and if the master³ ought in his opinion to be condemned, he should word his award thus: I condemn Publius Maevius (to pay) ten *aurei* to Lucius Titius, or to give up (the slave) as a *noxā*⁴. 2. And if the action be *in rem*, should he decide against the claimant, he ought to discharge the possessor; and should he decide against the possessor, then he ought to order him to restore the thing itself together with its profits. But should the possessor of the thing urge that he cannot restore the thing at the present moment, and appear to seek for time for the purpose of

¹ As all *iudicia* were *extraordinaria* in Justinian's day (IV. 15. 8), this title does not treat of the duties of the old-fashioned *iudex privatus*, but of those of the *iudex ordinarius* (or *rec-tor provinciae*) and *iudex pedaneus*, or deputy assigned by the *rector*.

A title on the duties of the *iudex privatus* would scarcely have been needful under the formulary system, for the Praetor in the *formula speci-*

fied what the *iudex* was to do according to the preponderance of the evidence: and so in the Commentaries of Gaius we have nothing analogous to the present topic.

² The penalty for breach of this duty was deportation, as Paulus tells us in *S. R.* 5. 25. 4.

³ I. e. the master of the slave who had done the damages.

⁴ IV. 8.

tuendi causa petere, indulgendum est ei, ut tamen de litis aestimatione caveat cum fideiussore, si intra tempus quod ei datum est non restituisset. Et si hereditas petita sit, eadem circa fructus interveniunt quae diximus intervenire in singularum rerum petitione. Illorum autem fructuum quos culpa sua possessor non perceperit in utraque actione eadem ratio paene¹ habetur, si praedo² fuerit. si vero bona fide

making restitution without any intention to cause inconvenience, this favour must be granted to him, provided, however, that he gives guarantee with a surety for the value of the thing in dispute in the event of his not making restitution within the time allotted him. And, again, if it be an inheritance that is claimed, the same rules are applicable to the profits, which we have just mentioned as applying in an action for a single article. As regards those profits which the possessor has failed to gather through his own negligence, an account is taken almost in the same way in both these actions¹, if he has been a *mala fide* possessor². But if he has been a *bona fide* possessor, no

¹ The force of the word *paene* in this passage has been a matter of much dispute. Some commentators think the meaning to be that "the rules as to ungathered fruits are almost the same in the ordinary *actio in rem* as in the *petitio hereditatis*:" others that "in the two actions, viz. *actio in rem* and *petitio hereditatis*, the rules as to gathered fruits and ungathered fruits are almost identical." Cujacius takes the former view, and says the word *paene* points to a difference of procedure, viz. that in the *actio in rem* the *judex* takes account of ungathered fruits as a matter of course, but in the *petitio hereditatis* only when the *formula* specifies that he is to do so; but we can find no authority for this statement; and even if true, it has nothing to do with the procedure prevalent in Justinian's day. Others say that Cujacius is right in his interpretation, but wrong in his reason for it, the true distinction being that in the *petitio hereditatis* not only the fruits themselves, but the fruits of

the fruits can be obtained from the *mala fide* possessor, whereas in the *actio in rem* only the actual fruits can be recovered. See D. 5. 3. 40. 1: D. 22. 1. 2 and 15. This is true enough, but applies to gathered fruits also; in fact the passages from D. 22 seem to relate to the latter only: and moreover, if we take the first translation, Justinian will merely tell us that the rule is the same in the two cases, without informing us what the rule is. Hence on the whole we are inclined to agree with Schrader, who upholds the other version, and says the word *paene* refers to the difficulty of proof in the case of ungathered fruits; both those gathered and those ungathered are to be restored, but it is much more easy to shew what have been gathered, than what might have been gathered.

² *Praedo*=a *mala fide* possessor, for such an one is in a certain sense a robber. See Theophilus *ad locum*, and Brissonius, *sub verb.* "*praedo*."

possessor fuerit, non habetur ratio consumptorum neque non perceptorum¹; post inchoatam autem petitionem etiam illorum ratio habetur qui culpa possessoris percepti non sunt, vel percepti consumpti sunt². (3.) Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is cum quo actum est, sed opus est, ut etiam causam rei debeat exhibere, id est ut eam causam habeat actor quam habiturus esset, si cum primum ad exhibendum egisset, exhibita res fuisset. ideoque si inter moras usucapta sit res a possessore, nihilominus condemnatur. praeterea fructus medii temporis, id est eius qui post acceptum ad exhibendum iudicium ante rem iudicatam intercessit, rationem habere debet iudex. Quodsi neget is cum quo ad exhibendum actum est in praesenti exhibere se posse, et tempus exhibendi causa petat, idque sine frustratione postulare videatur, dari ei debet, ut tamen

account is taken either of the profits consumed or of those not gathered¹; although after the commencement of the suit an account is taken of those not gathered through the fault of the possessor, or gathered and consumed². 3. If the action be one *ad exhibendum* (i.e. for production), it is not sufficient for the defendant to produce the thing, but it is incumbent on him to produce its circumstances also, i.e. he must cause the plaintiff to be in the same condition in which he would have been had the thing been produced when he first brought his action for production; and therefore if owing to delay the possessor has gained an usucaptive title, still he is condemned. Moreover the judge ought to take account of the profits of the intermediate time, i.e. of the profits subsequent to the assignment of the action for production and prior to the award. But should the defendant in the *actio ad exhibendum* deny his ability to produce the thing at the present moment, and ask for time in order to produce it, appearing also to make this application without an intention to cause inconvenience, time ought to be granted to him, provided he furnishes sureties that he will deliver the thing. But if he neither

¹ II. 1. 35. But in the *petitio hereditatis* the consumer was liable to the extent of his benefit; so that Justinian's remarks at this point

refer only to the *actio in rem*. See D. 5. 3. 40. 1; C. 3. 31. 1. 1.

² C. 7. 51. 2.

caveat se restitutum; quodsi neque statim iussu¹ iudicis rem exhibeat neque postea exhibitum se caveat, condemnandus sit in id quod actoris intererat ab initio rem exhibitam esse. (4.) Si familiae erciscundae iudicio actum sit, singulas res singulis heredibus adiudicare debet, et si in alterius persona praegravare videatur adiudicatio, debet hunc invicem coheredi certa pecunia, sicut iam dictum est², condemnare. eo quoque nomine coheredi quisque suo condemnandus est, quod solus fructus hereditarii fundi percepit aut rem hereditariam corrumpit aut consumpsit. quae quidem similiter inter plures quoque quam duos coheredes subsequuntur. (5.) Eadem interveniunt et si communi dividundo de pluribus rebus actum fuerit. quodsi de una re veluti de fundo, si quidem iste fundus commode regionibus divisionem recipiat, partes eius singulis adiudicare debet, et si unius pars praegravare videbitur, is invicem certa pecunia alteri condemnandus est;

produces the thing at once according to the order¹ of the judge, nor provides sureties for his future production of it, he must be condemned for such amount as the immediate production would be worth to the plaintiff.

4. Where the suit is the one called *familiae erciscundae*, the judge ought to adjudicate each separate thing to some particular heir; and if his adjudication seem to bestow an advantage on any single heir, he ought, as we have already said², to condemn this one to pay to his co-heir a fixed amount as an equivalent. A man ought also to be condemned to make payment to his co-heir on this same account, when he has enjoyed alone the profits of the hereditary estate, or damaged or consumed any article belonging to the inheritance. And these rules apply in like manner when there are several co-heirs, or when there are only two. 5. The same principles are applicable when there is an action *communi dividundo* in respect of several things. But if the action deal with one thing only, as a field, then, supposing that field to be conveniently divisible into portions, (the judge) ought to assign a portion of it to each of the parties; and should the share of either of them appear to be too great, this one ought to be condemned to pay as an

¹ The *actio ad exhibendum* was an "arbitrary" action; see IV. 6. 31: and *iubere* (not *condemnare*) was the technical term when the judge in

this class of action laid on the defendant a conditional award. D. 6. 1. 68.

² IV. 6. 20.

quodsi commode dividi non possit, vel homo forte aut mulus erit de quo actum sit, uni totus adiudicandus est, et is invicem alteri certa pecunia condemnandus. (6.) Si finium regundorum actum fuerit, dispicere debet iudex an necessaria sit adiudicatio. quae sane uno casu necessaria est, si evidentioribus finibus distinguere agros commodius sit, quam olim fuissent distincti: nam tunc necesse est ex alterius agro partem aliquam alterius agri domino adiudicari. quo casu conveniens est, ut is alteri certa pecunia debeat condemnari. eo quoque nomine damnandus est quisque hoc iudicio, quod forte circa fines malitiose aliquid commisit, verbi gratia quia lapides finales furatus est aut arbores finales cecidit. contumaciae quoque nomine quisque eo iudicio condemnatur, veluti si quis iubente iudice metiri agros passus non fuerit. (7.) Quod autem istis iudiciis alicui adiudicatum sit, id statim eius fit cui adiudicatum est¹.

equivalent a fixed sum of money to the other. If, however, it cannot be conveniently divided, or if it happen that a slave or a mule is the matter of action, then the whole must be adjudicated to one party, and he for equivalent must be condemned to pay a fixed sum to the other. 6. If the action be the one called *finium regundorum* (for adjustment of boundaries), the judge ought to consider whether an adjudication is necessary: and obviously it is only necessary in one case, namely when it is more convenient that the fields should be marked out by clearer boundaries than those by which they were previously distinguished; for then it is necessary that some portion out of the land of one be adjudicated to the owner of the other land; and under these circumstances it is fitting that he should be condemned to pay a fixed sum to the other party. On this score also must a person be mulcted in this action, namely when it happens that he has maliciously done some act affecting the boundaries; for instance, if he has secretly removed the boundary stones or cut down the boundary trees. And further a person is mulcted in this action on the ground of contumacy, as for example, if he has resisted the measurement of the lands when the judge directed it. 7. Anything adjudged to any person in these actions, at once becomes the property of him to whom it is adjudged¹.

¹ No delivery or formal act of conveyance was needful.

TIT. XVIII. DE PUBLICIS IUDICIIS.

Publica iudicia¹ neque per actiones ordinantur, nec omnino quicquam simile habent ceteris iudiis de quibus locuti sumus, magnaue diversitas est eorum et in instituendis et in exercendis. (1.) Publica autem dicta sunt, quod cuius ex populo executio eorum plerumque² datur. (2.) Publico-

TIT. XVIII. ON PUBLIC PROSECUTIONS.

Public prosecutions¹ are neither carried on by proceedings in the shape of actions, nor have they any resemblance at all to the other modes of trial of which we have been discoursing: and there is a wide divergency between them both in the manner of their commencement and in their process. 1. They are called public because in general² they may be set on foot

¹ *Judicia publica* were inquiries, set on foot at the instance of any citizen whatsoever, to determine whether the accused party had done wrong to the state at large, by committing a crime specifically forbidden by some *lex* or *constitutio*, and for which the said *lex* or *constitutio* had provided a definite punishment.

They differ, therefore, from *judicia privata* in two points; 1st, because any one could set the law in motion in a *judicium publicum*, but in a *judicium privatum* only that person who had suffered a personal wrong; 2nd, that the punishment was inflicted on account of the injury done to the commonwealth, and not on account of the damage or suffering caused to a particular individual.

They differ also from *judicia popularia*, because in the latter the penalty went to the prosecutor, whilst in *judicia publica* the penalty was either corporal, or, if pecuniary, went to the treasury.

They differ again from *judicia extraordinaria (criminalia)*, because the last-named were more of the nature of our English bills of pains and penalties, and were instituted

either, 1st, to punish an act or omission plainly immoral but not prohibited by any law; or, 2nd, to punish the breach of a law destitute of a sanction; or, 3rd, to punish the breach of a law furnished with a sanction, when the offence was accompanied with aggravations which rendered the evil of this sanction an inadequate punishment.

The topic of *judicia publica* lies outside the scheme of Justinian's Institutes, and we therefore do not intend to lay more stress on it than our author does; but those who wish to pursue the topic will find full information either in Heineccius, Book IV. Tit. xviii., or in Sigonius' *Antiqq. Rom.* Tom. II., and the annotations of Graevius thereupon. All these writers give a detailed account of each crime defined in the Roman Law, and a history of the legislation connected with it.

² These qualifying words refer rather to the prosecutor, than to the nature of the action. A list of persons who could not institute a *publicum judicium*—women, pupils, soldiers, magistrates, &c., &c.—is given in D. 48. 1. 8—13,

rum iudiciorum quaedam capitalia sunt, quaedam non capitalia. capitalia dicimus quae ultimo supplicio¹ afficiunt, vel aquae et ignis interdictione vel deportatione, vel metallo; cetera, si qua infamiam irrogant cum damno pecuniario, haec publica quidem sunt, non tamen capitalia.

3. Publica autem iudicia sunt haec. Lex Iulia maiestatis quae in eos qui contra Imperatorem vel rempublicam aliquid moliti sunt suum vigorem extendit². cuius poena animae amissionem sustinet, et memoria rei et post mortem damnatur. (4.) Item lex Iulia de adulteriis coercendis, quae non solum temeratores alienarum nuptiarum gladio punit, sed etiam eos qui cum masculis infandam libidinem exercere audent. Sed eadem lege Iulia etiam stupri flagitium punitur, cum quis sine vi vel virginem vel viduam honeste viventem stupraverit. poenam autem eadem lex irrogat pec-

by any member of the community. 2. Of these public prosecutions some are capital, some not capital. We apply the term "capital" to those which affect the parties with the extreme penalty¹, or with interdiction from fire and water, or with deportation or with (slavery in) the mines: the others, which inflict infamy together with a pecuniary loss, are public though not capital.

3. The public prosecutions are the following. The *Lex Julia* "concerning treason," which directs its severity against those who have designed anything against the emperor or the state². The penalty thereof involves loss of life, and even after death the memory of the criminal is branded with infamy.

4. Also the *Lex Julia* "concerning restraint of adulteries," which punishes with death not only those who defile another's marriage-bed, but also those who dare to indulge in foul crime with their own sex. And by this same *Lex Julia* is also punished the offence of seduction, when a man without resorting to violence debauches a maiden or a widow living a modest

¹ "Ultimum supplicium esse mortem solam interpretatur." D. 48. 19. 21.

² The intention was as criminal as the overt act. C. 9. 8. 5. But

this was a rule applicable to all *publica iudicia*, as we see from D. 48. 8. 14: "in maleficiis voluntas spectatur non exitus."

catoribus si honesti¹ sunt, publicationem partis dimidia² bonorum, si humiles, corporis coercionem³ cum relegatione. (5.) Item lex Cornelia de sicariis⁴, quae homicidas ultore ferro persequitur, vel eos qui hominis occidendi causa cum telo ambulant. telum autem, ut Caius noster interpretatione legis duodecim tabularum scriptum reliquit, vulgo quidem id appellatur quod ab arcu mittitur, sed et omne significatur quod manu cuiusdam mittitur⁵: sequitur ergo, ut et lapis et lignum et ferrum hoc nomine contineatur. dictumque ab eo, quod in longinquum mittitur, a Graeca voce figuratum ἀπὸ τοῦ τηλοῦ; et hanc significationem invenire possumus et in Graeco nomine: nam quod nos telum appellamus, illi βέλος appellant ἀπὸ τοῦ βάλλεσθαι. admonet nos Xenophon. nam ita scribit: καὶ τὰ βέλη ὁμοῦ ἐφέρετο;

life: the law inflicting on the offenders, if of honourable rank¹, the penalty of confiscation of half their property, and if of lower degree bodily chastisement² coupled with relegation. 5. Also the *Lex Cornelia de sicariis*³ which pursues with the avenging sword homicides or those who go about "*cum telo*" in order to slay a man. And *telum*, as our friend Gaius has set down in writing in his explanation of the law of the Twelve Tables, is commonly used to designate that which is shot from a bow, but also denotes anything which is propelled by a man's hand⁴; it follows therefore that a stone and a missile of wood or of iron are included under this appellation. Its derivation is from the fact that it is hurled to a distance, being framed from the Greek word τηλοῦ. And we may discover this meaning in the Greek name (for the same thing): for what we call *telum*, they style βέλος, from βάλλεσθαι. This Xenophon shews us, for he writes as follows: "simultaneously missiles

¹ There is some dispute as to the technical meaning of *honesti*, but possibly they are the same as *decuriones*. See D. 48. 8. 16; C. 9. 41. 11. The subject of *decurionatus* is discussed in App. H.

² Defined in D. 48. 19. 7 as "fustium admonitio, flagellorum castigatio, vinculorum verberatio."

³ The *Lex Cornelia de sicariis et veneficis*, enacted by Sulla, B.C. 81,

only punished homicides with banishment and confiscation of property: the penalty of death was introduced in later times. See D. 48. 8. 3. 5.

⁴ So Festus defines it "quibus procul;" Servius *ad Virg. Aen.* 11. 468 says "telum, quicquid longe jaci potest," and again, *ad Virg. Aen.* VIII. 249, "omne quod jaci potest."

λίγχει, τοξεύματα, σφενδόνας, πλείστοι δὲ καὶ λίθοι¹. sicarii autem appellantur a sica, quod significat ferreum cultrum. Eadem lege et venefici capite damnantur², qui artibus odiosis, tam venenis vel susurris magicis homines occiderunt, vel mala medicamenta publice vendiderunt. (6.) Alia deinde lex asperissimum crimen nova poena persequitur, quae Pompeia de parricidiis vocatur. Qua cavetur, ut si quis parentis aut filii, aut omnino affectionis eius quae nuncupatione parricidii continetur³, fata properaverit, sive clam sive palam id ausus fuerit, nec non is cuius dolo malo id factum est, vel conscius criminis existit, licet extraneus sit, poena parricidii punietur, et neque gladio neque ignibus neque ulla alia sollemni poena subiicietur, sed insutus culeo cum cane et gallo gallinaceo et vipera et simia, et inter eius ferales angustias comprehensus, secundum quod regionis

(βέλη) were hurled, spears, arrows, sling-stones, and a quantity of stones¹." *Sicarii* are so called from *sica*, which means a knife of iron. Under the same *lex* poisoners also are visited with capital punishment², who have caused men's deaths by odious arts, whether of poison or of magic charms, or have vended publicly destructive drugs. 6. Another law again, called the *Lex Pompeia de parricidiis*, provides a strange penalty for a most atrocious crime. In this it is laid down that any one who has hastened the end of an ascendant, or of a child, or of any relation whatever coming within the definition of parricide³, whether he has dared to do this secretly or openly; and further any one by whose evil instigation the act has been committed, or any one cognizant of the crime, even though he be a stranger; shall be visited with the penalty of parricide; and not be punished with the sword or the fire, or any other customary pain, but be sewn up in a sack with a dog, a cock, a viper and an ape, and confined within this deadly prison be cast either into

¹ Xen. *Anab.* V. 2. 41.

² Sc. *aquae et ignis interdictio*; see note on preceding page.

³ The full list is given in D. 48. 9. 1: "si quis patrem, matrem, avum, aviam, fratrem, sororem, patruelem, matruelem, patruum, avunculum, amitam, materteram, consobrinum, consobrinam, virum, ux-

orem, generum, nurum, socerum, socrum, vitricum, privignum, privignam, patronum, patronam occiderit." It will be observed that "filium, filiam" are omitted, but the restriction of *patria potestas*, as stated in our App. A, caused these afterwards to be added.

qualitas tulerit vel in vicinum mare vel in amnem proiicietur, ut omni elementorum usu vivus carere incipiat, ut ei caelum superstiti, terra mortuo auferatur. Si quis autem alias cognitione vel affinitate coniunctas personas necaverit, poenam legis Corneliae de sicariis sustinebit. (7.) Item lex Cornelia de falsis, quae etiam testamentaria vocatur, poenam irrogat ei qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subiecerit, quive signum adulterinum fecerit, sculpserit, expresserit sciens dolo malo. Eiusque legis poena in servos ultimum supplicium est (quod et in lege de sicariis et veneficis servatur), in liberos vero deportatio. (8.) Item lex Iulia de vi publica seu privata adversus eos exoritur qui vim vel armatam, vel sine armis commiserint. Sed si quidem armata vis arguatur, deportatio ei ex lege Iulia de vi publica irrogatur; si vero sine armis, in tertiam partem bonorum publicatio imponitur. Sin autem per vim raptus virginis, vel viduae, vel sanctimonialis, vel aliae fuerit perpetratus, tunc et peccatores, et ei qui opem

the neighbouring sea or into a river, according as the nature of the district permits; so that even in life he may begin to feel the want of all the elements, and that the light may be taken from him while he still exists, the earth when he is dead. If any man kill other persons united to him by relationship or affinity, he shall undergo the penalties of the *Lex Cornelia de sicariis*. 7. Also the *Lex Cornelia de falsis*, otherwise called the *Lex Cornelia Testamentaria*, imposes a punishment on him who has written, sealed, read or substituted a forged testament or other document, or has made, engraved or impressed a false seal, knowingly and with evil intent. The penalty of this law in the case of slaves is death (which is also the rule in the *Lex Cornelia de sicariis et veneficis*), and in the case of freemen is deportation. 8. Also the *Lex Iulia* "concerning violence public or private" is directed against those who commit violence with arms or without arms. And if armed violence be proved, deportation is inflicted, in accordance with the *Lex Iulia de vi publica*: but if violence without arms, a confiscation of a third of the offender's property is enforced. If, however, a rape with violence has been committed upon a maiden, or widow, or one under religious vows, or any other woman, both the offenders themselves, and those who have assisted in the crime, are

flagitio dederunt capite puniuntur, secundum nostrae constitutionis¹ definitionem ex qua haec apertius possibile est scire. (9.) Lex Iulia peculatus² eos punit qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. Sed si quidem ipsi iudices tempore administrationis publicas pecunias subtraxerunt, capitali animadversione puniuntur³, et non solum hi, sed etiam qui ministerium eis ad hoc adhibuerunt, vel qui subtractas ab his scientes susceperunt; alii vero qui in hanc legem inciderint poenae deportationis subiunguntur. (10.) Est et inter publica iudicia lex Fabia de plagiariis, quae interdum capitis poenam ex sacris constitutionibus⁴ irrogat, interdum leviolem. (11.) Sunt praeterea publica iudicia lex Iulia ambitus⁵, et lex Iulia repetundarum⁶,

punished capitally, in accordance with the provisions of our constitution¹, by reading which it is possible to know these points more fully. 9. Also the *Lex Julia* "concerning peculation"² punishes those who have stolen money or property which belongs to the state, or is sacred or religious. But if magistrates themselves embezzle public money during their time of administration they are punished capitally³; and not only they, but also those who have given them assistance in the matter, or have knowingly received the stolen property from them. Other persons who offend against this law are subjected to the punishment of deportation. 10. Amongst the public prosecutions there is also a *Lex Julia* "concerning kidnappers," which sometimes inflicts capital punishment, sometimes lighter punishment in accordance with the sacred constitutions⁴. 11. There are besides the following public prosecutions, the *Lex Julia* "against canvassing"⁵, the *Lex Julia* "against extortion" (by magistrates)⁶, the *Lex Julia*

¹ C. 9. 13. The penalty was death.

² The full title of the enactment is *Lex Julia peculatus et de sacrilegiis et de residuis*; some writers assign it to the time of Julius Caesar, but the prevalent opinion is that it dates from the reign of Augustus.

³ Technically a magistrate could not be guilty of *peculatus*, for that

crime is defined as a theft of public money committed by one not responsible for its keeping: D. 48. 13. 9. 2; but the magistrate who misapplied public money entrusted to him was chargeable *de residuo*.

⁴ See C. 9. 20, *passim*.

⁵ D. 48. 14.

⁶ D. 48. 11.

et lex Julia de annona¹, et lex Julia de residuis², quæ de certis capitulis loquuntur, et animæ quidem amissionem non irrogant, aliis autem poenis eos subiciunt qui præcepti earum neglexerint.

12. Sed de publicis iudiciis hæc exposuimus, ut vobis possibile sit summo digito et quasi per indicem ea tetigisse. alioquin diligentior eorum scientia vobis ex latioribus digestorum seu pandectarum libris, Deo propitio, adventura est.

“regulating the supply of corn¹,” the *Lex Julia* “concerning embezzlement of public money²,” and these deal with specific offences, and do not inflict the loss of life, but subject to other punishments those persons who disregard their provisions.

12. But these remarks upon public prosecutions we have given that it may be possible for you to touch upon them with the tip of your fingers, and, as it were, in outline. A more complete acquaintance with them, however, may be acquired by you, with God's help, by referring to our larger treatise, the Digest or Pandects.

¹ D. 48. 12. Under this law various offences were punishable, such as combinations to raise the price of

corn, or to delay its supply.

² D. 48. 13.

APPENDIX.

A. On *Fatria Potestas*.

IN the earliest period of Roman history the power which a father possessed over his children was absolutely free from legal restraint. The children were considered as much a part of his property as any of his goods and chattels. He could recover them, if unlawfully detained, by a *vindicatio*¹: could obtain a penalty from their detainer in the *actio furti*²; could transfer them by the selfsame process which was applicable to his slaves, viz. a *mancipatio*³: had over them the power of life and death, as both, Cicero⁴ and Aulus Gellius⁵ explicitly state in their account of the ceremonies accompanying arrogation: and lastly claimed for himself all the property which came into their hands, the son being both as to property and as to possession the mere agent of his father. The power of a father, then, over his son was practically the same as that of a master over his slave; but inasmuch as the rights in the former case were derived from express provision of the statutory or consuetudinary law of the city⁶, whilst in the latter they were considered to be derived from mere possession, an important difference in the law of pleading resulted, viz. that in the plaint whereby a father set out his claim, the words "*meum esse ex jure Quiritium*" were required, because a *vindicatio* for a son could only be maintained if brought "*adjecta causa*;" whereas in respect of any other chattel (and a slave was nothing more than a chattel) it was sufficient for the master to describe the chattel without any such qualifying words, i. e. to set out his plaint "*pure*."

Doubtless the source of the vast authority of the head of the household within the household must be traced up to the earliest development of Social Life: the family and not the individual was the unit in an ancient community⁷, and so the subordinate members of a family were not regarded as having a separate existence. Hence the notion of Dionysius, that the *patria potestas* was an invention of Romulus⁸, cannot be accepted even in the sense that it was a product of early legislation: it rather sprung from custom, as Ulpian asserts⁹, and that custom anterior possibly to the foundation of the Roman state. The *patria potestas* may either have been more highly developed as time went on amongst the Romans, or it may have subsisted for an inordinately long time in its strict and primitive simplicity;

¹ Ulpian in D. 6. 1. 1. 2.

² Ulpian in D. 47. 2. 14. 13, and Paulus in D. 47. 2. 38.

³ Gaius 1. 117.

⁴ Cic. *pro Domo* 29.

⁵ Aul. Gell. *Noct. Att.* v. 19: see also

C. 8. 47. 10.

⁶ Gaius 11. 90: D. 6. 1. 1. 2.

⁷ Maine's *Ancient Law*, c. v. p. 126; *Village Communities*, c. 1. pp. 15-17.

⁸ Dion. Halic. 11. 26, 27.

⁹ D. 1. 6. 8.

but when the old writers seize on *patria potestas* as an ordinance specially national¹, they are assuming to themselves what later research has exhibited to be common to all the archaic communities of mankind.

Patria potestas was exercised over sons, daughters, and all descendants through males. Originally it could only be determined by the death of the ancestor, or by his voluntary emancipation of the descendant, or by his transfer of him into the *mancipium* or *potestas* of another person. There might, however, be a temporary abeyance of authority during the period of tenure of state offices by the descendant, but at the expiration of such term the ancestor's *potestas* again reverted to him².

The same causes which exercised a wholesome influence on other portions of the old Roman life and smoothed away many of its harshest and most rugged features, operated beneficially on the *patria potestas*. The increase of the Roman territory and the consequent augmentation of the population of the city, with the continual advent of foreigners consequent on enlarged dominion and enlarged commerce, and, above all, the culture of Greek philosophy, produced a civilizing effect upon many old legal institutions that had seemed hard enough to resist any solvent. The cruel nature of the power attaching to the head of the family by degrees became sensibly and materially modified, and the property as well as the person of the children of the family were gradually removed from that excessive and extravagant dominion to which they had been subject. The steps in these changes we shall now briefly describe.

I. As to the person:—we have seen that at one time the parent had power of life and death, and hence, as Dionysius says, “he could expose his children to death immediately on their birth, or in their after years imprison, scourge, enslave, sell or kill them³.”

The right of exposing infants was, it would seem, in the earliest times under some amount of restriction, for the father could only exercise it when the weakness or deformity of the child was certified by five of the neighbours⁴; but towards the end of the Republic and under the Emperors we find abundant reference to the prevalence of the custom of exposure, and no indication that it was then under legal restraint⁵. Noodt asserts that there was not any prohibitory legislation on this head until the time of Valentinus, Valens and Gratian⁶, whilst Bynkershoek maintains that exposure was prohibited considerably earlier. The details of their controversy would be out of place here: it is sufficient to refer those desirous of pursuing this matter further to the treatises of the authors just cited⁷, but we may observe in passing that the extract from Tertullian referred to in the preceding note gives great weight to the argument of Noodt.

That the exposure of children was criminal after the publication of the rescript in C. 8. 52. 2 is admitted on all hands.

It became established in a very early stage of Roman History that a father who had once decided to rear his infant had no longer the power to put the child to death or to visit him with any severe punishment except for cause; and we gather from passages in the writings of Valerius Maximus, Quintilian, &c.⁸, that the usual course was to assemble a council of relatives

¹ Gaius 1. 55.

² D. 36. 1. 13. 5; 36. 1. 14. pr.: A. Gell. *Noct. Att.* 11. 2.

³ Dion. Halic. 11. 26, 27.

⁴ Dion. Halic. 11. 15.

⁵ Suet. *Octav.* 65; *Calig.* 5; Tacit. *Hist.* v. 5; Tertull. *ad Nat.* 1. 15.

⁶ He refers to 1. 52. 2.

⁷ Noodt, *De partus expositione*; Bynkershoek, *De jure occidendi liberos*; Noodt, *Amica Responsio*; Bynkershoek, *Curæ Secundæ*.

⁸ Val. Max. v. 2; Seneca, *de Clem.* 1. 25; Quintil. *Declam.* 111.

and neighbours, and inflict the punishment in their presence; the father himself, however, being sole judge, and the assessors having no legal power to mitigate his severity, although their disapproval would, no doubt, exercise a considerable moral influence upon him.

About the end of the first Christian century we begin to find instances of legislation in restraint of parental cruelty; Trajan compelled a father to emancipate a son whom he had grossly ill-treated, and further debarred him from inheriting the son's property¹: Hadrian deported a father who had killed his son in the hunting-field, although the son had been guilty of adultery with his step-mother²: it became the custom for a parent to accuse a delinquent child before the magistrate and to suggest to the latter the punishment to be inflicted³; and so we find Paulus speaking of punishment inflicted by the father's hand as a thing of the past; "*licet eos exheredare quos et occidere licebat*"⁴. The prohibition of severe corporal punishment by fathers soon followed; and sons, like other offenders, were brought before the magistrates⁵. Finally, Constantine included killing by a father in the category of parricide⁶, whereas parricide had previously denoted the murder of any near relative except a son⁷.

Patria potestas originally included another right over the person of the child, viz. the right of sale; which could be exercised three times in the case of a son, but once only in reference to other descendants⁸. Hence if a son who had been sold only once or twice received emancipation at the hands of the purchaser, he reverted into the *potestas* of his natural parent. It is well known that even under the Imperial régime adoptions were effected by imaginary sales; but in early days sales were frequently bona-fide and actual, and not followed by the extra formalities which converted them into adoptions. In fact so late as the time of Gaius, *mancipium*, or bondage, pure and simple, was a recognized status, though permanent in two cases only, viz. (1) when the son was transferred for a noxal cause, (2) when he was passed into *mancipium* with the view to a subsequent retransfer into his father's *potestas*, in order that the *potestas* might have its legal character changed from actual to adoptive⁹. In olden times, however, a father was able to give his son to a stranger in permanent *mancipium*, merely because it was his pleasure so to do.

Whether *mancipium* was ever exactly identical with slavery is doubtful, but certainly in very early times we find the great distinction that *mancipium* was relative, slavery absolute; in other words, a slave had no civic rights at all, whilst a bondman was free relatively to all persons except his master.

The alienation of adult children was subjected to regulations long before that of infants, and *mancipium* became a status generally determinable on demand of the bondman; but to this rule there were, as we stated above, two exceptions. A well-known rescript of Hadrian, in which the sale of children is described as "*res illicita et inhonesta*"¹⁰, probably refers only to sales not falling within these exceptions. Justinian, however, by his sweeping changes in the law of adoption, put an end to one of the exceptions named by Gaius¹¹, and his express abolition of noxal surrender in the case of children removed the other also¹². The sale of infants continued till the days of Diocletian and Maximian, when it was forbidden¹³; but Constantine

¹ D. 37. 12. 5.

² D. 48. 9. 5.

³ D. 49. 16. 13. 6; 48. 8. 2; C. 8. 47. 2.

⁴ D. 28. 2. 11.

⁵ C. 9. 15. 1.

⁶ C. 9. 17. 1.

⁷ D. 48. 9. 1.

⁸ Gaius I. 132, 134, 135a.

⁹ Gaius I. 140.

¹⁰ C. 7. 16. 1.

¹¹ See *Inst.* I. 11. 2.

¹² See *Inst.* IV. 8. 7.

¹³ C. 4. 43. 1.

created an exception in favour of parents who were too poor to bring up their offspring, and Justinian allowed this exception to remain, lest its removal should encourage infanticide¹.

II. As to property the old rule was very simple:—a *filiusfamilias* could have none, and whatever was in his apparent possession or ownership was really possessed or owned by the *paterfamilias*². The child, like the slave, was allowed to improve his father's condition, but not to make it worse. Hence he could not become a debtor without his father's consent; although, on the other hand, he might become a creditor, or, to put it more correctly, might by an act unknown to his father make the father creditor to a third party. He could, of course, make no testament, for he had nothing to bequeath; neither could he accept an inheritance without his father's permission, for an inheritance might be worse than valueless, and by old legislation the heir was compelled to pay all debts in full; hence the father decided as to refusal or acceptance, and if he made up his mind to accept, the son was not heir, but the father became heir himself through his assent to his son's nomination; there was, however, no need for the son to seek permission to accept a legacy, because in that case there was no liability to loss.

Fathers naturally allowed their sons in many instances to have money and goods at their disposal, but the law considered these *peculia* to be resumable at pleasure, and it was perfectly immaterial whether they proceeded from the father himself (*peculia profectitia*), or were presents from a stranger (*peculia adventitia*).

By degrees, however, sons were allowed to have proprietary rights independent of their father's control; first, in the time of Julius Caesar, over their acquisitions made whilst on military service (*peculium castrense*)³; then, over the profits of certain civil offices (*peculium quasi-castrense*); then, over the goods which came to them from their mother (*peculium adventitium*), a privilege conferred by Constantine⁴; and the *peculium adventitium* was afterwards made to comprehend acquisitions from any maternal ancestor, or from a husband or wife⁵; finally, Justinian extended it to property derived from any source whatever, except the father himself⁶. But it must be noted that the son derived no immediate profit from his *peculium adventitium*, for the usufruct or life-estate thereof was for the father's benefit; as, however, the latter had no power of alienation, the son was secure of the reversion on his father's death. Hence in the latest period of Roman Law the only *peculium* in the ancient sense was the *peculium profectitium*, which came from the father, and so might in all fairness and equity be resumed by him.

At no stage of Roman jurisprudence subsequent to the Twelve Tables did *patria potestas* affect the political capacity of a *filiusfamilias*, whatever might have been the rule in prehistoric days. Therefore the son could hold offices of state⁷, and exercise his functions even in cases where his father was a party; nay, he was actually permitted when in office to give legal sanction to his own adoption or emancipation⁸. He might also without holding office bring a suit in his own name for insult or outrage affecting himself personally⁹, although any damages awarded to him would at once become the property of his father.

¹ C. 4. 43. 2.

² See *Inst.* II. 9. 1.

³ D. 29. 1. 1. pr.

⁴ C. 6. 60. 1.

⁵ C. 6. 60. 2.

⁶ *Inst.* II. 9. 1.

⁷ D. 36. 1. 14. pr.

⁸ D. 1. 7. 3.

⁹ D. 44. 7. 9; 47. 10. 17. 13.

B. On Marriage and its Effects on the Status and Property of the Wife.

It is proposed in this note to supplement the information which Gaius and Justinian afford us on the subject of marriage, by describing the forms whereby it was contracted at various stages of Roman history, and pointing out the varying effects of these forms on the status and property of the wife.

Justinian in his Institutes refers but briefly to marriage, *justae nuptiae*, as one of the possible foundations of *patria potestas*¹, the other modes of establishing that authority over children being legitimation and adoption: he also gives a somewhat minute account of the persons debarred from marriage on account of relationship or affinity²; and there his discussion of the topic comes to an end. But Gaius, as is his wont, gives us more information as to the history and antiquities of the subject; and by supplementing his information by that which can be gathered from other ancient writers, and particularly from Aulus Gellius, we can form a pretty accurate notion of the character of marriage in the early republican, and perhaps even in the regal, times.

It is clear that the ancient Romans had advanced one stage beyond the most primitive conception of marriage, which has, quite in modern times, been developed and reproduced, as it were, from oblivion by Von Maurer, Nasse and Landau in Germany and by Maine, MacLennan and other writers in England: and yet traces of the primæval system can still be observed in the early Roman practice. The Romans had passed that era when the members of a family were not only subject to the power of their chief, but inseparably connected together and tied to the family, so that the married woman remained in subjection to her blood-relatives throughout her life³. She could, when our records commence, be separated from her family; and in the case of patrician unions, at any rate, she frequently was: but the transfer could only be brought about by special formalities, and was not presumed from the mere fact of marriage. Thus there was marriage with *conventio in manum*, entered into with numerous formalities; marriage without *conventio in manum*, contracted in a simple and less formal manner.

Conventio in manum resulted from three different nuptial processes; *confarreatio*, *coemptio* and *usus*; and there is no necessity to describe at length the ceremonies indicated by the first two of these three designations, for Gaius gives a pretty clear account of them, and those who desire to be acquainted with fuller details will find them in the old, but very valuable, treatises of Brissonius and Hotomanus⁴. On the ancient property rights of the wife and husband Ulpian has given us a short but most comprehensive dissertation in his "Rules"⁵.

Confarreation was the most ancient of the above-named rites, and its importance depended on the facts, 1st, that the wife abandoned her old domestic Penates and became a worshipper of those of her husband, which of course could only be by consent of her parent or agnatic guardian; and, that the children of a confarreated marriage, styled *patrimi et matrimi*,

¹ *Inst.* i. 9. 3.

² *Inst.* i. 10. 4—7.

³ Maine's *Village Communities*, p. 15; *Ancient Law*, p. 154, 1st edition: MacLennan's *Primitive Marriage*, p. 49.

⁴ Gaius i. 110—114. Brissonius, *de ritu nuptiarum et jure connubiorum*: Hotomanus, *de veteri ritu nuptiarum*.

⁵ Ulpian *Reg.* Title vi.

were alone eligible for certain sacred offices in the State, whence Tacitus makes the decline of their number in his days a matter of regret¹; 3rd, that the wife by confarreation became in the eye of the law a daughter of her husband, so that he acquired over her rights analogous to those involved in *patria potestas*, including the power of life and death, and the ownership of all the property she held at the time of marriage or acquired afterward. Hotomanus and Heineccius maintain that the husband had actual *patria potestas* over his wife², or in other words they uphold the doctrine that *manus* and *patria potestas* were identical, resting this conclusion on the well-established fact that the wife *in manu* was neither *sui juris* nor under the *potestas* of her father. Still, as marriage by confarreation could only be dissolved by *diffarreatio*³, a solemn religious rite never sanctioned by the Pontifices without extreme necessity, it would appear that the husband lacked one at any rate of the rights of *patria potestas*, viz. that of selling his *filiafamilias* wife into *mancipium* or bondage; and so it would seem to us that the creation of marital *manus* destroyed the parental *potestas*, and substituted a somewhat different authority in its place, rather than that the *patria potestas* was transferred intact from the father to the husband.

In contradiction of the view we have adopted, reliance has been placed on the following passage from Gaius' Commentaries: "*mulieres quavis in manu sint, nisi coemptionem fecerint potestate parentis non liberantur. Hoc in Flaminica Diali senatusconsulto confirmatur, quo ex auctoritate consulum Maximi et Tiberonis cavetur, ut haec quod ad sacra tantum videatur in manu esse, quod ad caetera perinde habeatur, atque si in manum non convenisset*."⁴ It has been argued from these words that confarreation did not destroy *patria potestas* at any period of Roman jurisprudence. But to this we reply that the italicized portion of the passage is but a conjectural restoration to which undue weight must not be attached; and further that the statement, even if the restoration be correct, applies only to the effects of confarreation, as reimposed by Augustus on his re-establishment of the office of Pontifex Maximus, after it had been in abeyance for some seventy-five years; therefore what that emperor laid down to suit the spirit of his own times is no criterion of the older usage. Ulpian at any rate says that *conventio in manum* occasioned a *capitis deminutio*, and draws no distinction between the *conventio* arising from confarreation, coemption or use⁵.

It is highly probable that confarreation was in historical times the only form by which marriage with *conventio in manum* (or possibly *justae nuptiae* of any kind) could be effected. When therefore the Lex Canuleia, in B.C. 445, allowed *conubium* between the plebeians and the patricians⁶, the concession would have been valueless, unless some other solemn process of marriage had been sanctioned: for confarreation was plainly inapplicable, seeing that the plebeians had no Penates or *sacra domestica*. Hence *coemptio* was either invented, or adopted from the custom of the plebeians and raised to solemnity; or (as Mühlenbruch suggests) may have been one of the minor ceremonies of a confarreation, and was now separated from the purely religious observances of that method of perfect marriage, and made effectual when employed alone. At any rate coemption began to be the popular mode of bringing about a *conventio in manum*, so that Cicero

¹ Tacit. Ann. iv. 16.

² Hotom. *de veteri ritu Nuptiarum*, c. 20: Heinecc. *Antiqq. Rom.* i. 10. 6.

³ See Festus, *sub verb.*

⁴ Gaius i. 136.

⁵ Ulp. xi. 10.

⁶ As to the political effect of this law see Ihne's *History of Rome*, Vol. i. c. 2, pp. 210, 211.

in discussing the marriage-law speaks only of *coemptio* and *usus*¹; which again confirms what we have said above of the temporary abeyance of confectionation.

This *coemptio* was a reciprocal purchase of wife by husband and of husband by wife²; and the fact that the wife was a purchaser as well as purchased may account for what has been already mentioned, viz. that a woman *in manu* could not be sold as a bondslave. *Coemptio* established the same rights and duties between the parties to a marriage as confectionation, even making the wife a participator in the *sacra domestica* of her husband, if he were a patrician; although this perhaps had not been the case originally.

Custom was always regarded by the Romans as closely approximating to law in its binding force³, and therefore if a man and woman who had not made a *coemptio* acted as though they had made one; the father of the woman, if alive, also conniving; all the consequences of a *conventio in manum* ensued. A wife therefore who wished to remain *sui juris*, or whose father wished to retain over her his *potestas*, had either to enter into a marriage-contract, *instrumentum dotale*, before the commencement of cohabitation, or absent herself for three nights in each year; otherwise she became a *materfamilias* by *usus*⁴.

And here we may remark that the woman married with *conventio in manum* was alone dignified with the title of *materfamilias*; one married without was simply *matrona*⁵.

Iustae nuptiae with *conventio in manum* having been the prevalent form of marriage in the earliest historic times of Rome, we have discussed this topic first; but it is to be borne in mind that *iustae nuptiae* without *conventio* had undoubtedly existed still earlier, and in fact had been the only prehistoric form; hence the latter mode continued as an exception in the ancient days of Rome, and by degrees resumed its prevalence with the advance of civilization, the resuscitation of the influence of the *jus naturale* and the depression of the peculiar and technical *jus civile*. So long as there was a proper marriage (*matrimonium, iustae nuptiae*), the children were *in potestate*, although if there was no *conventio in manum* the wife was not *in manu*. Hence, we have next to consider how *iustae nuptiae* without *conventio* differed from illicit cohabitation. The criteria were originally three: 1st, the age of the parties; 2nd, the existence of *conubium* between them; 3rd, the formal consent of themselves and of their parents or guardians.

As to age, it was needful that both parties should have attained to puberty; which was fixed at fourteen years in males and twelve in females. As to *conubium*, the rule laid down by Ulpian⁶ is simple: "Conubium habent cives Romani cum civibus Romanis, cum Latinis autem et peregrinis ita si concessum est: cum servis nullum est conubium;" in other words, one Roman could as a matter of course marry another Roman, the requirements as to age and consents being satisfied; but a Roman could only enter into *iustae nuptiae* with a Latin (Colonarius or Junianus), or with a resident alien, after permission had been applied for and obtained at the *Comitia*⁷; and marriage with a slave was absolutely impossible. These rules were never formally altered, but *conubium* was necessarily extended

¹ Cic. *pro Flacco* 34.

² Boethius, *ad Cic. Top.* 3. 14.

³ D. 1. 3. 32. 1; 1. 3. 33; 1. 3. 35 and 36.

⁴ Tab. VI. l. 4; Gaius 1. 112.

⁵ Aul. Gell. *Noct. Att.* 18. 6.

⁶ Ulpian *Reg.* v. 3—5.

⁷ See examples in Livy, XXXVIII. 36; XLIII. 3.

through the conversion of Latins into full citizens, and the gradual admission of provincials to the Roman citizenship by successive emperors.

As to consent:—The husband, if a *paterfamilias*, could contract a lawful marriage at his pleasure; but, if a *filiusfamilias*, needed the approval of his *paterfamilias*: and the wife always required consent in the olden time, namely, the consent of her *paterfamilias*, if she had one, and that of her tutor, if she were *sui juris*; for it is to be remembered that until the passing of the Lex Claudia women were under the perpetual tutelage of their agnates¹. After the enactment of the Lex Claudia women were under fiduciary tutors, whose consent to their marriage could probably be demanded as of right; so that the introduction of this law may be regarded as a turning-point in the law of marriage. The tendency of later legislation was to exempt women from tutelage of any description, and by the time of Justinian they needed consent only under those circumstances where it was requisite for men. Thus the *instrumentum dotale*, which had always been a matter of considerable importance, became the sole test (age and *conubium* being presumed) which decided whether *nuptiae* were *justae* or *injustae*². The *dos* might be small, or even utterly insignificant, but whatever its amount the *instrumentum dotale* (sometimes called the *instrumentum nuptiale*) had to be drawn up, for its existence was the proof of that most essential matter, the agreement of the parties themselves to the nuptial contract.

Hence we are drawn into a consideration of the nature of *dos*³. *Dos*, then, was the portion, whether consisting of money, goods or lands, brought by the wife to her husband. It was styled *profectitia* when coming from the natural and usual source, the bride's father; *adventitia*, when given by a stranger or by the bride herself; and here we must specially notice a most important rule of the Roman law, that if the marriage was unattended with *conventio in manum*, the woman retained the whole of her property not made over as *dos*, and the husband had no control of it whatever. Under the same circumstances the wife was not *in manu*, but personally independent of her husband, remaining in the status she had before marriage, whether *sui juris* or *alieni juris*.

The *dos* was the husband's property; but when it consisted of land he had no power to alienate it⁴; and when it consisted of money or goods he might not wilfully waste it or give it away, although he might change its form, alter the method of its investment, &c. It was a fund set aside for the purposes of the marriage, i.e. for the maintenance of a common home, the education and settlement of the children, and the support of the wife herself when the marriage was terminated by a divorce or by the husband's death.

If the dissolution of the marriage took place through the wife's death, the *dos profectitia* reverted to her father, unless there were children of the marriage; for then one-fifth was retained for the benefit of each child; or, if their number exceeded five, the whole fund was divided equally amongst them: the husband being their trustee as to the reserved amount. The *dos adventitia*, on the other hand, became the absolute property of the husband on his wife's death, if it had proceeded from her; and so also did it when it had been given by a stranger, unless the stranger had stipulated at the time of donation that there should be a reversion to himself. The

¹ Gaius i. 157.

² See Plaut. *Trinumm.* iii. 2. 63–65.

³ Our authority for the greater part of

the following statements is Ulpian in Title vi. of his *Regulae*.

⁴ Gaius ii. 63; Just. *Instit.* ii. 8. p.

dos in this last-named case was termed *receptitia*, and the promise of restoration could be enforced by the donor.

When the marriage came to an end by a divorce, *dos receptitia* of course went according to the terms of the agreement which had been made, but *dos profectitia* or *adventitia* went to the woman herself, if she were *sui juris*, and to her father, if she were *in potestate*. Still, retentions were allowed, if the divorce had been occasioned by the misconduct of the wife¹, (1) for the benefit of the children, (2) for the benefit of the husband. The portion reserved for the children was, as in the former case, administered by their father; and amounted to one-half of the *dos* amongst them, if three or more were living; or, one-sixth to each, if there were but one or two. The husband's share was one-sixth, when the wife had been divorced for adultery; one-eighth, when for a justifiable but less criminal reason².

If the marriage came to an end by the death of the husband, the *dos* belonged to the wife. It is probable that she was restrained from alienation when there were children of the marriage surviving; but we have no certain information as to the manner in which their reversionary interest was protected³.

In somewhat late times⁴ it became customary for the husband to make a settlement on his wife in return for the *dos* which she brought to him; and as this settlement was at first only valid if made before marriage, it was called *donatio ante nuptias*. Of this fund also the husband was trustee, but the wife was assured of its enjoyment in the event of her surviving him by its being made inalienable even with her consent. When Justinian enacted that a *dos* might be created or augmented after the marriage had taken place, he laid down the same rule for a gift on the part of the husband, and changed the name from *donatio ante nuptias*, to *donatio propter nuptias*⁵.

In case of the prior decease of the husband, the wife was entitled to the same share of the *donatio propter nuptias* as that to which the husband was entitled in the *dos*, supposing he outlived his wife; and no provision to the contrary could be enforced, even if inserted in the *instrumentum nuptiale*⁶.

The actions by which the wife enforced the restitution of her marriage-portion are treated of in *Inst.* iv. 6. 29 and 37.

C. On Adoption and Arrogation.

"Arrogation," according to Roman law-writers, is the adoption of a person *sui juris*, and the term "adoption" is confined to the adoption of one who is *alieni juris*.

In the time of Gaius the process of arrogation resembled the passing of a *lex*, and took place *populi auctoritate*⁷. As *populus* is elsewhere defined thus by Gaius: "*populi appellatio, universi cives significantur*, con-

¹ Ulpian vi. 10; Cic. *Top.* 4.

² As to other deductions occasionally allowed when a *dos* was returned, see Ulpian vi. 9, 14-17.

³ These rules as to retention applied only when there had been no agreement in the *instrumentum nuptiale* as to the destination of the *dos* on the dissolution of

the marriage. If there had been, the compact was enforceable. C. 5. 14. 9.

⁴ We find the *donatio ante nuptias* first named in a constitution of Theodosius and Valentinian. C. 5. 17. 8. 4.

⁵ *Inst.* ii. 7. 3.

⁶ C. 5. 14. 9.

⁷ Gaius i. 98.

numeratis etiam patriciis¹," we should have imagined at first view that the transaction took place before the *Comitia Centuriata*; but a passage in the *Noctes Atticæ* of Aulus Gellius² states so explicitly that arrogations were made in the *Comitia Curiata*, as to drive us to the conclusion that Gaius, l. 98, is using *populus* in its other signification of patricians, as opposed to plebeians.

Hence we should argue, firstly, that originally patricians alone could arrogate or be arrogated; and secondly, that the reason for retaining the old machinery for arrogation after the fusion of the two orders in the State was that, although the *Comitia curiata* was essentially a patrician assembly, it had dwindled down to an attendance of thirty lictors³, who approved as a matter of course of all matters laid before them; and so an assembly which had become insignificant would serve as well as any other to bestow an assent which, whether for patricians or plebeians, was now a mere form.

In early days, however, express legislative sanction had been required for so solemn an act as the absorption of the family of the *arrogatus* into that of the *arrogans*⁴ for three reasons; firstly, because the maintenance of a family and its sacred rites was viewed as a matter of religion, and as influencing the prosperity of the State⁵; secondly, because the *populus*, representing the old *gentes*, claimed a right of succession to all vacant inheritances as "*parens omnium*;"⁶ thirdly, because arrogation caused a *capitis deminutio*, and a law of the Twelve Tables, quoted by Cicero⁷, had laid down the rule "*de capite civis nisi per maximum comitatum ne ferunto*," and though this rule fell into abeyance so far as simple adoption was concerned, it was upheld in the more important matter of arrogation. Arrogation by Imperial Rescript eventually supplanted that by popular sanction, when the doctrine had become established that the whole authority of the nation was vested in the Emperor⁸, but the alteration did not follow immediately on the change of the government. Augustus⁹, Claudius¹⁰, and other emperors adopted in the ancient form, i.e. by order of the *populus*: the practice was prevalent in Galba's time, as we see from the speech which Tacitus puts into the mouth of that prince: "*si te privatus lege curiata apud pontifices, ut moris est, adoptarem*"¹¹; and both Ulpian and Gaius speak of *arrogatio per populum* as existent in their day¹².

As the Pontifices are mentioned in the passage above quoted, we may perhaps infer that it was their duty to investigate and make report to the *Comitia* on such questions as the following (which, at any rate, were investigated by some official or other); viz. whether the adoptor was old enough to be allowed to adopt: whether he was without hope of offspring: whether his reason for adopting was a reasonable and proper one¹³; whether his age exceeded that of the adopted person by "full puberty," or eighteen years. As to this last being a requirement there is, however, some diversity of opinion: Modestinus lays down the rule absolutely¹⁴, but Gaius speaks with a certain amount of doubt: it was at any rate established in the most express terms by Justinian¹⁵.

The derivation of the word *arrogatio* is thus explained in Gaius' Com-

¹ Gaius l. 3.

² A. Gell. *Noct. Att.* v. 19.

³ Cic. *de Leg. Agrar.* ii. 12.

⁴ Gaius l. 109; Just. *Inst.* l. 11. 11.

⁵ Hence we have the provision in the XII. Tables: "*Sacra privata perpetuo manent*." As to these *sacra privata* see Cic. *de Leg.* ii. 19; Festus *sab ver.*

⁶ Tacit. *Ann.* iii. 28.

⁷ Cic. *de Leg.* iii. 4.

⁸ Just. l. 2. 6.

⁹ Suet. *Aug.* 65.

¹⁰ Tacit. *Ann.* xii. 25.

¹¹ Tacit. *Hist.* l. 15.

¹² Ulpian *l. 111. 2-4*; Gaius l. 98.

¹³ A. Gell. *Noct. Att.* v. 19; Cic. *pro Dom.* 10. 13; D. 7. 2. 2. 3; D. 7. 1. 17. ff.

¹⁴ D. 7. 2. 40. 1; Gaius l. 106.

¹⁵ Just. l. 11. 4.

mentaries¹: "the adopter is interrogated (*rogatur*) whether he wishes the man whom he is about to adopt to become his lawful son; he who is adopted is interrogated (*rogatur*) whether he agrees to this being done; and the *populus* is interrogated (*rogatur*) whether they order it to be done." The actual forms of these interrogations are preserved to us by Cicero and Aulus Gellius².

Bearing in mind that the process of arrogation was performed in the Comitia, we are able to give a reason for certain ancient rules regarding the persons concerned in an arrogation: 1st, none but Romans could arrogate or be arrogated, for none but Romans were members of the Comitia: 2nd, arrogation was allowed to childless married persons, but not to bachelors, for "adoption imitates nature³," and an unmarried man could not have any person under his *potestas*⁴: 3rd, no person under sixty could arrogate, for he ought rather to hope for children of his own⁵: 4th, deaf and dumb persons could not arrogate or be arrogated, for they could not hear or answer the questions addressed to them: 5th, women could not arrogate or be arrogated, for they had no right to appear in the Comitia; and not only for that reason was the power of arrogating denied them, but for the further one that they could exercise no *potestas*: 6th, a pupil could not be arrogated, for he had not the ability to declare his own consent; and his tutor's authority would have been abused, if he had used it for the subjection of his ward to the domination of a third party⁶; 7th, arrogations could take place only at Rome⁷.

The first of these rules was never altered: the second, third, fourth and fifth were of course liable to infraction as soon as arrogation depended on rescript, or, in other words, on the will of a despot; as also was the rule that arrogation could take place only at Rome: the sixth also was no longer observed, but various safeguards were invented to secure the pupil from prejudice, three of which are mentioned in the Institutes, viz. (1) that if the arrogated person died before attaining puberty, his property reverted to his original heirs; (2) that if he were emancipated under puberty without satisfactory cause, he received back the whole of his own property, and one-fourth of that of his emancipator; (3) that even if he were emancipated for a sufficient reason, he got back his own property⁸: the fourth, not named by Justinian, being that the arrogator had only the usufruct of the property of the arrogated, and the latter on attaining puberty could, if he pleased, set the arrogation aside.

Simple adoption neither extinguished a family by the absorption of its sole remaining member, nor defeated an escheat to the *populus*, and therefore whether under the republic or in imperial times was effected without much difficulty by mere application to a magistrate, provided only the Pontifices reported favourably on those questions of age, motive, &c., named above. Adoptions became very frequent when penalties began to be imposed on unmarried and childless persons; and it is to be borne in mind that although the Lex Julia et Papia Poppaea in the reign of Augustus, A. D. 10, was the most sweeping enactment in reference to these matters, it was by no means the earliest, as we see from a speech which Aulus Gellius puts into the mouth of P. Scipio⁹.

The ancient method of adoption, by a *mancipatio* performed in the

¹ Gaius i. 99.

² Cic. *pro Domo*, 29; A. Gell. *Noct. Att.* v. 19.

³ Inst. i. 11. 4.

⁴ Cic. *pro Domo*, 13.

⁵ D. i. 7. 15. 2.

⁶ A. Gell. *Noct. Att.* v. 9.

⁷ Ulpian viii. 4.

⁸ Inst. i. 11. 3.

⁹ A. Gell. *Noct. Att.* v. 19. See also

Dio Cassius, lvi. 10.

presence of the Praetor, is described by Gaius; and we have merely to refer the reader to the passage¹ and our notes thereupon. In later times the formalities of the *legis actio*, i.e. the *mancipatio*, were swept away, and all that was requisite was that the renunciation of *potestas* by the actual father and the acceptance of the same by the adopting father should take place in the magistrate's presence.

Up to Justinian's day the adopted son passed entirely from the original family and was recognized by the law as a member of the new family in all respects; subject to the *patria potestas* of the adopter, exempt from that of his actual parent; without successory rights in reference to his relations by blood, except as a mere cognate; possessing them as an agnate in regard to his relatives by adoption. But all this was changed by Justinian²; and thenceforward in an ordinary adoption, frequently called *adoptio minus plena*, the son lost none of his rights and was freed from none of his duties to his true ascendant; and, on the other hand, was under no obligations and had no rights, save one, against his adopter. That one right was the privilege of claiming a son's portion, if the adopting parent died intestate; but the latter had the power of making a testament and entirely defeating his adopted child's expectation.

Justinian, however, allowed the old rules to remain in force in the case of an *adoptio plena*, i.e. an adoption made by an ancestor, as is stated expressly in Inst. I. II. 2.

It must be noted that Justinian's regulations had reference to adoption only, and not to arrogation. An arrogated person always passed, together with all his descendants in *potestate*, under the arrogator's *potestas*, whether the latter were a stranger or an ascendant.

D. On *Capitis Deminutio*.

Scarcely any topic in Roman law has been the subject of more discussion than the precise signification of the phrase *Capitis Deminutio*. The general definitions given in the sources are so lax in their wording that they might include every possible change of status, whether advantageous, prejudicial or neutral; and yet when we come to instances we find the ancient jurists systematically applying the title to certain specific changes, and not to others which their broad definition would seem equally to embrace: and further, their practical employment of the term seems at first sight as incompatible with the etymological sense of *deminutio*, viz. "degradation," as with their own wider definition of it as a "change."

The definitions themselves stand thus:

- (1) Est autem capitis deminutio prioris status commutatio³;
- (2) Capitis minutio est status permutatio⁴;
- (3) Minima capitis deminutio est per quam, et civitate et libertate salva, status dumtaxat hominis mutatur⁵;
- (4) Est autem capitis deminutio prioris capitis permutatio⁶.

¹ Gaius I. 134.

² C. 8. 48. 10.

³ Just. Inst. 16. 1. pr.

⁴ Gaius in D. 4. 5. 1.

⁵ Ulpian Reg. xi. 13.

⁶ Gaius Comm. 1. 159.

And the same notion of *deminutio* being a *mutatio*, *commutatio*, *permutatio*, is incidentally implied in many other passages¹.

From these passages the most obvious inference would have been that *capitis deminutio* meant each and every possible change of status; but when we turn to the texts of the Digest and Code where specific changes are discussed, we find that *capitis deminutio* is certainly used as synonymous with prejudicial change of status of every possible variety, but only applied to some of the favourable or neutral changes, and not to others.

Hence we see that we must not interpret the above quoted passages in their most obvious sense, "that *capitis deminutio* is a change (i.e. any possible change) of status;" but in another sense, which they will fairly bear, that "*capitis deminutio* is a name applied to some varieties of change of status." These *capitis deminutiones* seem also at first sight to be so named arbitrarily, and without reference to etymology; but we will now proceed to shew that every *deminutio*, whatever be its final result, does at some stage of the process, though possibly not the ultimate one, import a degradation.

To make this clear we must first define *status*. *Status*, as Savigny tersely puts it, is the inverse measure of the restrictions of a man's natural liberty which are recognized by the municipal law: in other words, the fewer his restrictions the higher his status, and vice versa. These recognized restrictions are dependent, 1st, on the natural condition of the man, i.e. his condition of freedom or slavery; 2nd, on his civic condition, i.e. the political privileges with which he is invested; 3rd, on his family condition, i.e. his domestic capacity: thus we have *status libertatis*, *status civilis*, *status familiae*². Under each of these the Romans recognized a tripartite division, as follows:

I. In relation to liberty.

- | | |
|--------------|-----------|
| A. Ingenui | } Liberi. |
| B. Libertini | |
| C. Servi. | |

II. In relation to citizenship.

- | |
|---------------|
| A. Cives. |
| B. Latini. |
| C. Peregrini. |

III. In relation to family.

- | |
|---|
| A. Patresfamilium. |
| B. Filiifamilium (including women <i>in manu</i>). |
| C. Qui in mancipio sunt. |

Now let us consider the possible changes of status.

We premise that an *ingenuus* can never become a *libertinus*, nor a *libertinus* an *ingenuus*, because these distinctions depend on facts which are unalterable, viz. the condition of the man at his birth, whether slave or free. We should otherwise have had nine possible changes for the better and nine for the worse; as it is, we have seven only of either kind.

We have then the following prejudicial changes; all of which are *degradations*, and therefore *deminutiones* according to etymology; all of which again are *changes*, and therefore *deminutiones* according to the four general definitions given above; and further, all of which when referred to individually are designated by that title in the works of the classical jurists:

¹ E. g. in D. 4. 4. 9. 4 (a quotation from Ulpian); in D. 4. 1. 2 (extracted from Paulus); as also in the *Sententiae Receptae* of Paulus 1. 7. 2, and III. 6. 29;

and in C. 7. 16. 28.

² Savigny, *Traité du droit Romain*, traduit par Guénoux, Vol. II. p. 57.

- (1) *Ingenuus* or *Libertinus* into *Servus*¹: *capitis deminutio maxima*
 (2) *Civis* into *Latinus*²:
 (3) *Civis* into *Peregrinus*³: } *capitis deminutio media*.
 (4) *Latinus* into *Peregrinus*⁴: }
 (5) *Paterfamilias* into *Filiusfamilias*⁵: } *capitis deminutio minima*.
 (6) *Paterfamilias* into *Mancipium*⁶: }
 (7) *Filiusfamilias* into *Mancipium*⁷: }

The advantageous changes ought, according to the general definition of the Jurists, to be styled *deminutiones* in all cases: etymologically they be so designated in no instance whatever; but practically the So treating of them individually include or exclude them in the former manner, at first view most arbitrarily:

- (8) *Servus* into *Libertinus*⁸:
 (9) *Latinus* into *Civis*⁹: } never styled *capitis deminutio*:
 (10) *Peregrinus* into *Civis*¹⁰: }
 (11) *Peregrinus* into *Latinus*¹⁰: }
 (12) *Filiusfamilias* into *Paterfamilias*: in some cases styled *deminutio*, but not in others¹¹.
 (13) *Mancipium* into *Paterfamilias*: not spoken of at all¹².
 (14) *Mancipium* into *Filiusfamilias*: never styled *capitis deminutio*.

There are also two changes, which may be styled neutral changes of equality, viz.

- (15) *Mancipium* into *mancipium*: not called *capitis deminutio*¹⁴
 (16) *Filiusfamilias* into *filiusfamilias*: always called *capitis deminutio*.

And we might have added (17) *Servus* into *Servus*, when a slave alienated; but as a slave has no *caput*, this seems not to belong to the discussion of *capitis deminutio*.

It is clear then, as we said at the beginning of this disquisition, that *capitis deminutio* is not perfectly synonymous with *change of status*.

¹ Just. *Inst.* i. 16. 1; Gaius i. 160.

² Boethius *ad Cic. Top.* 4: "media vero in qua civitas amittitur, retinetur libertas, ut in Latinis colonias transmigrationis." See also Gaius iii. 56; Cic. *pro Caecina* 33.

³ *Inst.* i. 16. 2; Gaius i. 161.

⁴ Although this third declension is not named in the sources, we may be certain that the deportation or interdiction of a Latin had the same effect on his status as on that of a Roman citizen.

⁵ By arrogation, or in later times by legitimation. *Inst.* i. 16. 3; i. 10. 13; also by the marriage with *conventio in manum* of a woman *rei juris*.

⁶ Although in later times only *filiusfamilias* and women *in manu* are spoken of as being degraded in *mancipii causam*, yet clearly the *nexi* or *addicti* of more ancient days were *in mancipio*, and not in slavery pure and simple, as we see from Quintilian, *Inst. Orat.* v. 10. viii. 4, and *Declam.* 311. We may also argue in like manner from Just. *Inst.* i. 4; regarding this passage as partly a reminiscence of

the ancient law. See Cujacius' *Notiones*, xiii. 9.

⁷ Gaius i. 116, 132, 141, 162.

⁸ "Servus autem manumissus non minuitur, quia nullum caput *Inst.* i. 16. 4.

⁹ Gaius i. 28—32.

¹⁰ See instances quoted in our Gaius i. 95.

¹¹ A *filiusfamilias* could be *paterfamilias* by the death of his or by emancipation. In the latter is always spoken of as undergoing *deminutio*; but never in the other. i. 162; Just. *Inst.* i. 16. 3.

¹² This change belongs to very times, and became impossible when *manus servitutis* died out.

¹³ Gaius i. 140.

¹⁴ This occurred in one of the forms of adoption described by Gaius i. 134. Probably in older times a *nexus* or *addictus* could also have been transferred from hand to hand.

¹⁵ This was the ultimate result of the form of adoption. Gaius i. 134.

change to which the term is applied is obviously a prejudicial one, save in the cases numbered (12) and (16). But even these two, although resulting in an advancement or an equality of status, were really brought about by a degradation followed by an exaltation; for we have only to read carefully the description of the processes of emancipation and adoption given by Gaius in l. 132—134, to see that they consisted of a depression from *potestas* to *causa mancipii* effected by a sale *per aes et libram*¹; followed sometimes by a transfer from one *mancipium* to another *mancipium*; but always ending in the liberation from *mancipium* by means of a *cessio in jure*, and the reinstatement under *potestas*. This would be the final stage in an adoption, whilst for an emancipation one process more would follow, viz. the emancipation strictly so called; which for a technical reason could not be suffered to destroy a natural *patria potestas*, though it could be legally employed for the dissolution of one that was merely adoptive. Hence, there was clearly in both cases a degradation followed by an elevation of status: and so when we look at the separate parts of the process, we call the first (7) a *deminutio*, whilst we very properly do not call the second or third portion by that name, (15) or (14): although when we are referring to the whole ceremony we describe adoption or emancipation as involving a *capitis deminutio*.

As a summary then of our argument, we say: *Capitis Deminutio* always denotes a change of status involving incidentally or ultimately a depression.

And now for the objections brought against this theory. Some writers have maintained that *Capitis Deminutio* sometimes implies a purely advantageous change, but no one has gone so far as to say that it includes every possible alteration of status. Thus all agree that the general definitions of the Jurists are to be taken in a narrow sense, the only question being how narrow.

Savigny agrees with us that the sense of *deminutio* must be narrowed till it accords with its etymology; but Hotoman, Ducaurroy and others take the opposite view². Some of the passages adduced from the Digest by our opponents are simply inconclusive, agreeing equally with their theory or ours³; but we must devote a few lines to the consideration of three passages, one from the Digest and the others from the Commentaries of Gaius and the Rules of Ulpian, which at first view militate directly against our conclusions. Paulus, as quoted in the Digest⁴, says "the children who follow an arrogated parent suffer *capitis deminutio*;" and yet we know that they were under *potestas* before the arrogation, and are under *potestas* after it, so that their status is the same as before. Where then is the degradation? Savigny says that Paulus speaks doubtfully⁵, and that no other writer maintains that there is in this case a *capitis deminutio*: but to us it appears that there most undoubtedly is a degradation, and therefore in the strictest sense a *capitis deminutio*: for the *arrogatus* brings his children to the *arrogans* as though they were part of his goods, i.e. he treats them for a moment as though they were slaves, or at any rate in *causa mancipii*, and so there is here the very same fictitious depression which occurs in the case of an ordinary adoption.

Again, there are two passages where *conventio in manum* is described as a *capitis deminutio*⁶: but if these refer to the marriage of a woman *sui juris*,

¹ See also D. 4. 5. 2. 2. "emancipari nemo potest nisi in imaginariam servilem causam deductus."

² See Hotoman's Commentary on Inst. l. 16: Ducaurroy in Thémis, Vol. II. pp.

180—184.

³ D. 4. 5. 7. pr.: D. 4. 5. 11.

⁴ D. 4. 5. 3. pr.

⁵ "Placet minui caput."

⁶ Gaius l. 16a; Ulpian xl. 13.

they are accordant with our theory, for such an one not only changes her family but undergoes a degradation of status; if, however, they refer to the marriage of a *filiafamilias*, they are fatal to our hypothesis, for this woman not only returned to her original status on the completion of the ceremony, being *filiafamilias* of her husband instead of *filiafamilias* of her father, but she did not even undergo a temporary depression of status¹. But Gaius and Ulpian are plainly referring to the former not the latter; for the passages above mentioned occur in their disquisitions upon *tutela*, and *tutela* of course only existed when a woman was *sui juris*.

Hence we conclude that no substantial objection can be brought against the theory that *capitis deminutio* is an appellation confined to those changes of status which involve ultimately or transiently a depression.

E. On the Disinheritance or Omission of Children in a Testament.

I. Regulations of the *Jus Civile*.

According to the rules laid down by the Decemvirs, children *in potestate*² could be disinherited or omitted by their father at his pleasure, for in the Twelve Tables testamentary power of the most unrestricted character was conferred upon all persons *sui juris*: "uti legassit super pecunia tutelave suae rei ita jure esto." Tab. v. l. 3.

But in times somewhat later, though still anterior to Praetorian legislation, i.e. earlier than B.C. 366, it became the rule that the appointment of a stranger as heir was ineffectual against a son *in potestate*, unless the son were expressly disinherited³. The *Jus Civile* therefore drew a distinction between omission and disinheritance.

Disinheritance by name would bar the successory rights of any descendant.

Disinheritance *inter ceteros* would bar the rights of all classes of descendants except a son; and by disinheritance *inter ceteros* is to be understood one in the following terms: "Let Lucius Titius be heir, and let all others (*ceteri*) be disinherited⁴."

A testament wherein a son was disinherited otherwise than by name was absolutely void, so that not only was the inheritance taken away from the appointed heir, but the legacies also were lost to the legatees; for the institution of the heir was the foundation of the whole testament, and its invalidity therefore ruined everything.

It was not necessary to assign a cause for disinheritance, and thus descendants were entirely at the mercy of their ancestor.

The omission of all mention of a son was of course as fatal to the testament as his disinheritance *inter ceteros*: the omission of a daughter, a grandchild, or other descendant had a less disastrous effect: for by disinheritance, as already stated, their rights of succession were entirely destroyed, whereas omission without disinheritance enabled them "to attach themselves for a portion," *accrescere in partem*; and what that portion should be

¹ Gaius i. 123.

² Of course by children *in potestate*, we denote those of nearest degree to the testator in their own *stirps*, or in other words *sui heredes* alone. Other persons *in potestate* could neither be appointed nor disinherited,

for they relapsed at their ancestor's death into the *potestas* of some intermediate person.

³ Gaius ii. 123: Ulpian xxii. 16, 20.

⁴ Just. Inst. ii. 13. pr.: Gaius ii. 17, 128: Ulpian xxii. 20.

depended on the character of the instituted heirs; if those heirs were *sui heredes* of the testator, the omitted persons claimed their *virilis portio*, i.e. the amount they would have had in case of the intestacy of their ancestor; whilst if the appointed heirs were strangers, one half of the estate was taken from them and divided *per stirpes* amongst the omitted descendants¹. Legacies were, if necessary, diminished rateably, so as to make these modifications of the testamentary dispositions possible.

The ancient jurists were at variance on the question whether the omission or disinheritance *inter ceteros* of a son was fatal to the testament in all cases, or only when the son outlived his father. This point was still disputed in the time of Gaius², but when Justinian wrote it had been settled that the testament was vicious from the beginning, and that therefore the death of the son before the father could not make it good³. So that Cato's rule, originally applicable to legacies only⁴, was ultimately extended to inheritances as well.

II. Regulations of the *Jus Honorarium*.

The Praetors introduced some very important amendments in correction of the severity of the above rules, the chief of which were as follows:

(1) All male descendants who are *sui heredes* must be appointed or disinherited by name⁵:

(2) Posthumous male descendants, i.e. those born after the death of the ancestor, and who would have been *in potestate* if born previously, must be appointed or disinherited expressly⁶:

(3) Omitted female descendants can take the whole inheritance (and not merely the half) as against strangers appointed heirs⁷:

(4) Posthumous female descendants must be named in a testament, i.e. they must either be appointed heirs, or be expressly disinherited, or if disinherited *inter ceteros* must have a legacy given to them⁸:

(5) Persons who become *sui heredes* through quasi-agnation caused by the death of those prior to them, must be appointed heirs or disinherited in precisely the same form as if they had been *sui heredes* when the testament was made⁹.

(6) Emancipated children must be treated by their ancestor as though they were still *in potestate*¹⁰.

On these rules we must offer a few observations.

The third rule was altered by Antonine, who restored the regulation of the *jus civile*, and allowed women only to have *bonorum possessio* of one half of the estate when strangers had been appointed heirs¹¹.

The second and fourth rules were innovations on the ancient maxim that an uncertain person could not be instituted heirs¹².

Postumus when these rules were first laid down had the same significance as *posthumous* in the English law, viz. a descendant born *after the death*

¹ Gaius II. 124: Ulpian XXII. 147.

² Gaius II. 123.

³ Inst. II. 13. pr.

⁴ D. 34. 7. 1 and 3.

⁵ Gaius II. 129.

⁶ Gaius II. 130, 131: Ulpian XXII. 18, 19, 22.

⁷ Gaius II. 125.

⁸ Gaius II. 132: Ulpian XXII. 18, 19, 21.

⁹ Gaius II. 133, 134.

¹⁰ Gaius II. 135: Ulpian XXII. 23.

¹¹ Gaius II. 126.

¹² Gaius II. 287: Ulpian XXII. 4.

of his ascendant. The testator therefore had to provide for a son or daughter who might be born within ten months after his decease; and this at first he was only allowed to do by appointing them heirs (or at any rate naming them, if females), although the Lex Junia Velleia subsequently allowed him, if he preferred it, to disinherit them¹. This Lex Junia Velleia, passed in the reign of Augustus, went further, and not only empowered a man to appoint or disinherit by anticipation *sui heredes* born after his death², but also those born after the making of the testament and before his death³; and these latter persons were for a time styled *postumi Velleiani*, and afterwards *postumi* simply; so that *postumus* changed its meaning, and assumed the signification, always attached to it by later writers on the civil law, of a person born after the completion of his ancestor's testament. As to grandchildren, the rule seems originally to have been that the grandfather had only to provide for those whose father was dead when he made his testament: whereas if the father were alive at that time, all that the testator could lawfully do was to nominate the said father heir or disinherit him expressly, and in case of his death make a new testament to provide for the case of a grandchild being born posthumously. (Of course if the father left living children behind him a new testament had to be made at once by the grandfather, for new *sui heredes* of his came into being.) Gallus Aquilius, however, who lived in the time of Cicero and was his colleague in the Praetorship, enabled a testator to provide by anticipation for the case of a posthumous grandchild born after the testator's death and the prior decease of the testator's son; but his power was limited, for he could only appoint the grandchild heir to save himself from intestacy, and could not disinherit him⁴.

In the last case discussed we have been obliged somewhat to anticipate, for the *postumus* just named is a *quasi-agnatus* as well, and so falls under the fifth rule.

On that rule we must note that *quasi-agnation* simply means the springing up of a new *suius heres* otherwise than by birth; which latter event is technically described as *agnatio sui heredis*: hence marrying a wife *in manu*, adopting or arrogating any person, and receiving back a son who had been a captive with the enemy, were circumstances styled *quasi-agnations*, and always made a new testament necessary⁵; since they were all, save the last, voluntary acts on the part of the testator, for the consequences of which he had to provide; but there was another variety of quasi-agnation over which the testator had no control, viz. when a grandchild became *suius heres* through the death of a son. It might be inconvenient or even impossible for a new testament to be made in such a case, and therefore another clause in the Lex Junia Velleia enabled the testator to disinherit or appoint such a *quasi-agnatus* (*quasi-postumus Velleianus*) by anticipation; though as a matter of fact he could have appointed him previously, for he was not an *incerta persona*⁶.

(7) A seventh rule, established during the period when the Praetors were actively engaged in legislation, though not originating from the Edict, but from custom or a Lex Glicia, was most important, viz. that a person disinherited without cause, or appointed heir to a smaller proportion of the inheritance than his *portio legitima*, could bring a *querela inofficiosi* and overthrow the testament.

¹ D. 28. 2. 29. 13; Gaius II. 134.

² Ulpian XXII. 19.

³ D. 28. 2. 29. pr.

⁴ Gaius II. 138—142; Ulpian calls all

these events *agnations*.

⁵ For a discussion of the intricacies of the Lex Junia Velleia, see D. 28. 2. 29. 11—16.

This rule, strange to say, is not mentioned in the Commentaries of Gaius or in the Rules of Ulpian, and yet the *querela inofficiosi* was a form of proceeding sufficiently ancient to be referred to by Cicero¹. Besides, both Gaius and Ulpian speak elsewhere of remedies provided on behalf of those unjustly disinherited; the latter telling us explicitly that although the Praetor would not grant *bonorum possessio contra tabulas* in such cases, yet the injured descendant might institute a *querela inofficiosi*²; and a long and intricate controversy between Cujacius and Hotomanus was founded on the inscription of an excerpt in which Gaius informs his readers that disinheritance made through mere caprice could not be sustained³; Cujacius maintaining that this protection of the disinherited originated from the Lex Glicia, and Hotomanus that it sprung up through custom⁴. Paulus speaks of the *querela* being brought even by instituted descendants who had been appointed heirs to a smaller amount than their *portio legitima*, and fixes the amount of the latter at one-fourth of the share due on an intestacy⁵.

The *querela*, it is to be noted, was brought in the Centumviral Court, which for a long period had exclusive jurisdiction in testamentary matters⁶.

Hence we may conclude that some time prior to Justinian's legislation no descendant *in potestate* (at any rate no male descendant) could be disinherited, or even appointed to an illusory share, without a justifiable reason set down in the testament itself; and that the same rule also applied to emancipated descendants (although not to those given in adoption). *Postumi* and *quasi-agnati* were under a different rule, and all that was needful in their case was that the Praetorian rules should be observed.

III. Regulations of Justinian in the Code, Digest and Institutes.

1st. Male and female descendants, if not previously on an equal footing in all respects, were now made so; and consequently a female could bring the *querela inofficiosi* even against *sui heredes* who had been appointed heirs.

Omission, therefore, and disinheritance or illusory appointment, without reasonable cause assigned, were fatal in the case of any descendant⁷.

2nd. It was no longer needful that a descendant should be appointed heir to the extent of his *portio legitima*: so long as the proper amount was bestowed on him by legacy, donation *mortis causa*, &c., he could bring no *querela*⁸.

3rd. Even if the gift were smaller than the *portio legitima*, yet the fact of there being a gift at all barred the *querela*, and the claimant must proceed by *actio in supplementum legitimæ*⁹.

4th. Adopted children, who hitherto could claim a *portio legitima* from their adopter and nothing from their actual father, were enabled instead to claim a portion from their real father, and lost their right of succeeding to the adopter, unless the latter died intestate. These new regulations, however, did not affect *plena adoptio* or *arrogatio*¹⁰. *Postumi* could no longer be disinherited.

¹ Cic. *in Verrem*, I. 42.

² D. 37. 4. 8. 1.

³ D. 5. 2. 4.

⁴ Cujac. *Observationes* II. 21; XVII. 17;

Hotom. *Disp. de Quarta Legitima* 1.

⁵ Paulus *S. R.* IV. 5.

⁶ Cic. *de Orat.* I. 38.

⁷ *Inst.* II. 13. 5; II. 18. pr.

⁸ *Inst.* II. 18. 3.

⁹ *Ibid.*

¹⁰ *Inst.* II. 18. 2.

5th. Ascendants and brothers and sisters were also allowed their *portio legitima*, but the latter only in case the instituted heirs were infamous persons¹.

Alterations were again introduced by Justinian in his 115th Novel, the chief provisions of which are stated above in note (6) on p. 176.

F. On the Causes rendering a Testament invalid.

When a testament would not stand, it might be either,

Injustum,
Non jure factum, } owing to some original defect :
Imperfectum :

Nullius momenti, { if a child were omitted or disinherited without
Nullum : { cause : if the testator had not *testamenti factio* : or
if the heir had it not.

Ruptum : by an agnation or quasi-agnation ; by a subsequent testament : by revocation or destruction :

Iuritum or *irritum* : through a *capitis diminutio* of the testator, or through no heir appearing under the testament :

Destitutum : also when no heir appeared under it :

Rescissum or *Inofficiosum* : when a *querela inofficiosi* was sustained.

G. On the Law of Legacies according to Justinian.

Justinian informs us in his Institutes² that he had amalgamated the rules of legacies and trusts, although for the sake of simplicity he should deal with them separately in that treatise. It may, however, be worth while to state briefly here the rules affecting legacies after their identity with trusts had been established.

I. Definition.

A legacy may be defined as the gift of a specific subject or subjects, the payment whereof is charged upon the heir or upon another legatee ; whereas a *fideicommissum universale* is a direction to the heir to turn over to the legatee the whole or a definite portion of the estate, no particular articles being designated.

II. The persons concerned.

1st. It was requisite that the donor of the legacy should have *testamenti factio*, but not at all needful that he should make a testament ; for the legacy might be given in a codicil or even by mere verbal direction, and in either of these cases it had to be paid by the heir *ab intestato*³.

¹ Inst. II. 18. 1.

² II. 20. 3.

³ II. 25. 1.

2nd. The person on whom the legacy was conferred must have *testamenti factio passiva* at the time when the legacy vested, although it was not essential for him to have it also when the legacy became payable¹.

Hence no uncertain person could be a legatee; although the rule was relaxed in favour of an uncertain member of a definite class². A *postumus*, being an uncertain person, could not therefore on principle receive a legacy; but Justinian allowed *postumi* to be legatees whenever they could be heirs; and consequently legalized the gift of legacies to *postumi sui* and to such *postumi alieni* as were not the offspring of incest or adultery³.

3rd. The person charged with the payment might be either the heir himself or another legatee: but no person could be compelled to pay more than he received⁴, except in the case where he was asked to part with something of his own in consideration of receiving something belonging to the testator; and then he put himself under an obligation by accepting the legacy⁵.

When it was not specified by whom the legacy was to be paid, the heir had to pay it; or if there were several heirs, they paid in proportion to their shares in the inheritance.

III. The subject of the legacy.

Anything whatever not *extra commercium* or impossible might be given as a legacy; whether corporeal or incorporeal; in existence or future⁶; the property of the testator, or of any person taking a benefit under the testament or by the intestacy, or of a stranger. The testator might even impose on his heir or on any other beneficiary the doing of some act for the profit of the legatee, this being in fact the legacy of a future right of suing for performance⁷.

When the legacy affected property belonging to a third party, it behoved the legatee to show that the testator knew this fact; otherwise it was presumed he would not have made the bequest, which accordingly became void⁸. But this presumption was set aside when the legatee was a wife or a very near relative of the testator⁹. So again when the testator bequeathed to the legatee an article which had been mortgaged or pledged, the heir had to clear it of incumbrance, if the testator knew it was incumbered; but the burden of proof was as before cast on the legatee¹⁰.

When another person's property was made the subject of a legacy, payment could not be enforced, if the legatee received the article *ex causa lucrativa* before the testator's death; but it could be enforced, if he received it *ex causa onerosa*¹¹.

A legatee's own property could not be the subject of a direct legacy to himself; but it might be bequeathed to him conditionally on its having left his hands before the legacy vested¹².

If a testator left property belonging to himself under a misapprehension that it belonged to a stranger or to the legatee, the legacy was good; "nam plus valet quod in veritate est quam quod in opinione"¹³.

In the case of a legacy in general terms (*legatum generis*), the legatee

¹ II. 20. 24; D. 35. 1. 104.

² II. 20. 25.

³ II. 20. 27 and 28; C. 6. 48.

⁴ II. 24. 1.

⁵ D. 31. 1. 70. 1.

⁶ II. 20. 7 and 21.

⁷ II. 20. 21.

⁸ II. 20. 4.

⁹ C. 6. 37. 10.

¹⁰ II. 10. 5.

¹¹ II. 20. 6.

¹² II. 20. 10; D. 35. 1. 98.

¹³ II. 20. 11.

had the right of election when several articles answered the description; unless the testator specified to the contrary¹.

Amongst incorporeal legacies may be particularized *legatum nominis*, where the testator bequeathed to the legatee his right of suing a third party for payment; *legatum debiti*, where the testator left a legacy to his creditor instead of paying him the debt which was due; *legatum liberationis*, where the testator remitted the debt owed by his legatee.

In a *legatum nominis* the heir had merely to make over to the legatee the right of action belonging to himself as general successor to the deceased, without in the least guaranteeing the debtor's solvency²: in a *legatum debiti* it was necessary that the legacy should be more valuable than the remitted debt which it replaced, otherwise debt and legacy were treated as coexistent³: in a *legatum liberationis* relief might be given not only to the testator's debtor, but to the debtor of any other person; the heir being in the latter case under an obligation, enforceable by action, to discharge the debtor's liability, and in the other case being met by the *exceptio doli* if he attempted to exact payment⁴.

A legacy might be under condition; and this variety of legacy included those instances where payment was made dependent on the arrival of an uncertain day, whether the uncertainty were absolute, or contingent on the happening of any event (certain to occur at some time) within the lifetime of the legatee. The specification of a fixed day *ex quo* or *ad quem* was not a condition; for the legacy was vested, although in the one case its payment was delayed and in the other terminable.

When a legacy was to two or more persons jointly, and some refused or were unable to accept the gift, there was in general an accrual to those who accepted⁵; the rules, however, on this subject varied considerably at different periods, and as we have given an account of them in App. (G) to our edition of Gaius and Ulpian, we shall merely refer the reader thither.

So long as the legatee could be identified, a mistake as to his name or description was immaterial⁶: so also was the assignment of a false reason for the gift⁷. It had at one time been essential that the appointment of the heir should precede the gift of the legacies, that the latter should not be made to vest after the death of the heir or legatee, and that they should not be by way of penalty: but all these rules were swept away by Justinian⁸.

IV. Revocation and Transfer of Legacies.

A legacy could be revoked by word as well as by writing⁹: also by the destruction of the subject¹⁰, its conversion into a different form¹¹, the gift of it to another person by the testator in his lifetime¹², his sale of it without pressing necessity¹³, the springing up of a deadly hostility between the testator and the legatee¹⁴, &c.

The legacy would also be void if the legatee died or lost his *testamenti factio* before the decease of the testator; or if he renounced the legacy and no co-legatee could claim the accrual.

¹ II. 20. 22 and 23. In Gaius' time the heir would elect, if the legacy were *per damnationem*; the legatee, if it were *per vindicationem*.

² D. 30. 1. 75. 2.

³ II. 20. 14 and 15.

⁴ II. 20. 13.

⁵ II. 20. 8.

⁶ II. 20. 29 and 30.

⁷ II. 20. 31.

⁸ II. 20. 34-36.

⁹ D. 34. 4. 3. 11.

¹⁰ II. 20. 16.

¹¹ D. 30. 1. 65. 2.

¹² D. 34. 4. 18.

¹³ D. 34. 4. 15 and 18.

¹⁴ D. 34. 9. 9.

The transfer of a legacy was in all cases equivalent to the revocation of the old bequest and the creation of a new one, and might be effected in four ways, 1st, by giving the article to one person instead of another; 2nd, by charging the payment upon one person instead of another; 3rd, by changing the legacy itself; 4th, by making it conditional instead of absolute, or vice versa.

If the legacy altered in value between the time of the creation of the gift and the day of payment, the legatee took it with its augmentation or decrease¹. But if the article itself perished, the legatee had no claim to its accessions, except in the two cases named in *Inst.* II. 20. 17. These exceptions, however, are apparent rather than real, for children are not accessories to their mother²; and probably the same rule existed with relation to *vicarii* and *ordinarii*.

Vesting of Legacies.

There are two technical expressions connected with the Law of Legacies which require a few words of explanation: *dies cedit* and *dies venit*. By the word *dies* is meant generally the time when an existing right may be enforced. *Dies cedit* denotes that such time or term has begun to run, and that the owner of the right is advancing towards its fulfilment. *Dies venit* signifies that the time for the ripening of the right and the discharge of the corresponding duty has arrived, and that the owner of the right can enforce it. The example of a stipulation, given in D. 50. 16. 213, will help to illustrate this point somewhat further: "if the stipulation be absolute, the thing is due and can be exacted at once (*et cessit et venit dies*): if it is directed to a future date (*in diem*), the obligation begins to run, but has not yet arrived at maturity (*cessit dies sed nondum venit*): if it is conditional, the obligation neither runs nor arrives at maturity until the happening of the condition (*neque cessit neque venit dies pendente adhuc conditione*)."³ Hence, applying these principles, so soon as a testator died, living the legatee, without any change in his testamentary dispositions, so soon also did the legatee acquire an indefeasible right to the legacy, without any necessity for him to make a declaration of his acceptance, i.e. *dies legati cedit*. But his right and power to exact payment of the legacy commenced only when *dies legati venit*, i.e. when the heir (of whom alone he could demand the article) had acquired the inheritance³.

H. On the Civil Magistrates under Justinian.

It is not easy to understand the system of government in the time of Justinian without an explanation of the municipal and provincial authority of a much earlier age; for his scheme of administration was to some extent an amalgamation of the ancient magistracies of the *Solum Italicum* and the Provinces.

If we begin then by considering the constitution of the Roman Empire after the termination of the Social war, we find that the state consisted of

¹ II. 20. 17—20. ² D. 41. 3. 61. 1.

³ For further information as to the de-

tails of this topic, see D. 7. 3: D. 36. 2: C. 6. 53.

same well-defined powers, differing greatly in the machinery of their administration. The City of Rome, Italy, and the Provinces.

The laws of the *curia* are accompanied with the functions of the magistrates in the City during the last years of the Republic; it will be enough for us to transfer the present picture to the consideration of the municipal government in the *Italia Italica* i.e. Italy proper and those distant districts elsewhere which possessed the same franchise and in the dependent towns.

I. The *Italia Italica* was filled with a large number of *municipia*, each consisting of a town surrounded by a certain portion of territory, greater or smaller according to certain grades; the inhabitants of each of these towns were *Roman citizens*, and the municipal government was framed on the model of that of Rome itself. The sovereign power resided in the popular assembly. By this, as a rule, the magistrates were elected; by this the laws were made, subject only to the restraint that nothing could be enacted in opposition to the ordinances of the *Comitia* and Senate of Rome; and although this assembly accepted advice from the local senate it resisted all attempts at coercion¹. This local senate or *curia* consisted of a varying number of members, who bore the name of *decumviri*, as distinguished from the *citizens* at large, or *municipes*; an arrangement and nomenclature equally true of all Italic towns. These towns, however, were divided into three classes, *municipia praefecta*, *coloniae* and *praefecturae*. In the *praefecturae* the supreme magistrate was an official sent from Rome, and called *praefectus*; in the *municipia* and *coloniae* the supreme magistrates were two in number, elected annually from the members of the *curia*, but by the body of the *municipes*, and bearing the name of *duumviri* or *comices*. In some of the *municipia* of large size there were four chief magistrates, *quatuorviri*, whose functions, however, were identical with those of the *duumviri* of the smaller communities.

The history of all the Italic towns presents the same features: 1st, a successful attempt on the part of the *curia* to rob the *municipes* of their electoral and legislative rights; or in the *praefecturae* to rob them of their legislative rights only, because here the magistrates were from the very outset not elected but imposed by the sovereign government; 2nd, the depression of the *curiae* with their *duumviri* or *praefecti*, and their subordination to the authority of a *praeses* (*proconsul* or *legatus Caesaris*), or provincial governor, sent from Rome to hold authority in a district comprehending a considerable number of towns originally free and self-governed. Originally there had been no *praesides* in the *Solum Italicum*, although the Provinces had always been administered by officials appointed by the central government and bearing this name; or in some cases having a different title, but still possessing similar powers². Moreover, as we shall presently point out, the provincial towns had never possessed *duumviri* or *praefecti*, although the institution of the *curia* in them is a well-established fact.

But to return to the Italic towns. The Senate and its members are denoted by different names at different periods; originally *ordo decurionum*³, then *ordo* simply, finally *curia*, and the individual members *curiales*

¹ Cic. *pro Cluentio*, 8; Cic. *de Legg.* III, 16.

² Savigny is of opinion that the number was properly 100, quoting the instance of Capua in Cic. *in Rullum* II, 35. See Savigny's *Histoire du droit Romain au*

moyen âge, traduite par Guénoux, p. 74.

³ For instance the *juridicus* at Alexandria, D. I. 20: or the *praefectus Augustalis* in Egypt, D. I. 17.

⁴ Macrobius, *Sat.* II, 3. 11.

towards the middle of the fourth Christian century concentrated in the hands of the *legatus* or *praeses*, who, according to Savigny, was assisted in its exercise by subordinate officials styled *consulares* or *correctores*¹. The military power was lodged in other hands, viz. in those of the *magistri militum*; and these again had subordinate *duces* and *comites* acting under them. The ancient magistrates therefore were reduced to the position of subordinate rulers and judges, with few vestiges of their ancient supremacy as civil (and possibly as military) governors of their towns; and even their judicial functions, besides being subordinate and no longer supreme, were confined to a small portion of the matters formerly within their cognizance. The *duumviri* could of course no longer nominate a *judex privatus*², for the *judicia privata* were abolished and all civil proceedings were made "extraordinary;" they could no longer deal with matters which had previously been the subjects of their *cognitio extraordinaria*, such as *restitutiones in integrum*, *fideicommissa*, &c.; their cognizance, in fact, was restricted to the most unimportant of the causes in which they had in more ancient times issued their precept (*formula*) to a *judex*, and even as to these their decision was not final, but subject to the appeal to the *praeses*³. Nothing more clearly indicates their degradation from their former high estate than the facts that they could be sued even during the time of their tenure of office⁴, and could only secure the punishment of contemnners of their authority by an application to the *praeses*⁵.

II. We have now to consider the organization, administrative and judicial, of the Provinces; that is, of the districts originally Provinces, for, as we have already stated, the whole empire was provincial long before Justinian's time.

Towards the end of the Republic we find *curiae* established in almost all the cities of the provinces, but no magistrates similar to the *duumviri* or *praefectus* of an Italic town; no one in fact who was at once the centre of the administration of the place, the president of its senate, and the supreme local judge. The members of the *curiae* of the provincial cities had *munera*, but not *honores*; duties to fulfil, but no high distinctions open to them by way of a recompense. The government was centralized in the *praeses*, who was practically *praefectus* in each and all of the towns within his jurisdiction, and exercised his authority either by making periodical circuits, or (in senatorial provinces) by nominating deputies, *legati praesulis*, to superintend the administration of particular districts. The *decuriones* had simply to carry out orders, not, as within the *Italicum solum*, to exercise indirectly the functions of government by selecting or approving those who were to discharge them directly. It is to this state of things that the regulations of the Codes of Theodosius and Justinian chiefly refer,—for the latter was both drawn up in the Eastern Empire (where provincial land was the rule and Italic land the exception) and intended for the government of that region; and the Code of Theodosius though emanating from the Eastern was received in use and practise throughout the Western Empire. Hence we see why in both of them the functions of

¹ But Zimmern, whose view is in our opinion the correct one, says that the governor of a very extensive province was styled *proconsul*; the ruler of a province of moderate size, *consularis* or *corrector*; and the administrator of a very small province, *praeses* or *legatus*; whilst *rector* or *judex ordinarius* was an appellation common to all. See Zimmern, *Traité des*

actions chez les Romains, § xx.

² But they could in trivial cases nominate a *judex pedaneus*, or an official analogous to a *judex pedaneus*, as we explain in App. Q.

³ See as to these statements App. Q.

⁴ D. 47. 10. 22.

⁵ D. 2. 3. 1. pr.

the *decuriones* are fully discussed, why in neither of them is much said about the magistrates of the towns. And yet just as the history of the *Italicum solum* exhibits to us the gradual depression of the *duumviri* and the *curiae*, and the rise of a threefold system, wherein along with the *legatus*, exercising by far the largest share of power, appear the *duumviri* as minor functionaries, and under them again the *curiae*, not entirely insignificant; so in the Provinces we note the introduction of a class of officials, bridging over the wide gap between the *praeses* and the *decuriones*, and so bringing the two systems, Italic and Provincial, to an almost perfect identity. The functionaries of whom we are here speaking were the *defensores*. Originally this name had been applied to commissioners appointed by the *praeses* to execute in a city some temporary duty; but in the reign of Constantine the *defensores* were officials of a very different type. They were in those later days officers elected by the whole city, not by the *decuriones* only; the *decuriones* were also ineligible for the office; and the duty of a *defensor* was strikingly analogous to that of the ancient Tribune at Rome, viz. to defend the city and the citizens from oppression either at the hands of the *praeses* or the *curia*. Soon after their introduction as standing officials a jurisdiction in suits of minor importance was conferred upon them, subject, however, to an appeal to the *praeses*; they had also the duty of drawing up indictments in criminal causes; and were empowered to select and appoint tutors, &c.¹ About a century later the *defensores* had become the presidents of the *curia*, and therefore probably were elected from the *decuriones* instead of from the plebeian classes. Thus we see that the constitutions of the provincial and Italic cities, wide as their divergency was at first, had undergone modifications in opposite directions, until they had eventually become identical in all essential points.

III. Hence in Justinian's time the system of civil government throughout his dominions (composed chiefly of districts originally provincial, but with portions here and there which had been Italic) was uniform; for at the head of each province there was a *praeses* (*rector, legatus, proconsul, judex, judex ordinarius, juridicus*); in each town there were magistrates (*duumviri, praefectus, defensor*) with a small judicial authority and a still smaller administrative power, all of them now designated indiscriminately *magistratus minores* or *consules*; whilst under these again were the *decuriones* exercising some authority, however slight and limited, and subject to a responsibility of a very onerous nature.

K. On Bonorum Possessio.

Bonorum possessio was the title given by Roman lawyers to the formal recognition by the Praetor of a claimant's successory rights, whether these were in accordance with the provisions of a testament (*secundum tabulas*), in opposition to the provisions of a testament (*contra tabulas*), or in consequence of the want of a testament (*ab intestato*).

Hence we must warn our readers against falling into the vulgar error, that *bonorum possessio* was only granted to those who were entitled in equity though disqualified in law. This is the position maintained by Heineccius throughout his commentary on Title IX. Book III. of Justinian's Institutes, but fully refuted by Mühlenbruch in his notes upon the same². In fact

¹ See Savigny, *Histoire du Droit Romain au Moyen Âge*, II. § 23; p. 72 of Guénoux' translation.

² See also Haubold's *Praefationes*, pp. 1-18.

Justinian himself, in *Inst.* III. 9. 1, says expressly of the Praetor: "aliquando neque emendandi neque impugnandi veteris juris, sed magis confirmandi gratia pollicetur bonorum possessionem," and gives instances selected both from testamentary and intestate succession.

Bonorum possessiones therefore may be arranged in a twofold manner; viz. firstly as above named,

- (1) *Possessiones secundum tabulas.*
- (2) *Possessiones contra tabulas.*
- (3) *Possessiones ab intestato*¹.

Secondly,

- (a) *Possessiones adjuvandi juris civilis gratia.*
- (b) *Possessiones emendandi vel supplendi juris civilis gratia.*
- (c) *Possessiones impugnandi vel corrigendi juris civilis gratia.*

A tabulation in accordance with the first plan is given in App. (K.) to our edition of Gaius and Ulpian, based of course on the well-known texts of Ulpian and Justinian, and exhibiting the rules as they stood in the age of Gaius². Presuming therefore that the student has this tabulation before him, it is enough that we call his attention to the following important modifications introduced into two of the chief *possessiones* by Justinian's legislation.

I. The *possessio contra tabulas* could, after the enactment of the constitution in C. 8. 48. 10, be claimed with reference to the property of an actual parent, not merely by children *in potestate* at the time of his death, or emancipated, but also by those given in adoption to a stranger, i.e. to a person not an ancestor; and with reference to the property of an adopter, only by those adopted by an ancestor.

II. The *possessio unde liberi* underwent the same changes, and could further be claimed by any one whom a person not an ancestor had adopted, provided the adopter died intestate³.

Justinian mentions the *decem personae* as entitled next after the *liberi* and *legitimi* in the scheme of *bonorum possessiones ab intestato*; Ulpian omits them, possibly because their claim was seldom made even in his day; and of course it would be still rarer after Justinian's changes in the law of adoption. Justinian however is careful to tabulate all possible claimants, however unlikely might be the prospect of their application.

Justinian concludes his list with a class not named by Ulpian, viz. "qui ex legibus, senatusconsultis, constitutionibusve principum ex novo jure veniunt"⁴. These too Ulpian ought to have named, for their rights to *possessio* were acknowledged even in his day; but possibly he intended them to be included amongst the *legitimi*. There was, however, this distinction between the two classes, that *legitimi* obtained the inheritance *ex lege*, and the *bonorum possessio* alone from the Praetor; whereas *bonorum possessio* itself was conferred on the "*quibus ut detur*" by the *lex, senatusconsultum* or *constitutio* in which they were named⁵.

¹ Ulpian's *Regulae* xxviii.: Justinian's *Inst.* III. 9. 3-7.

² Gaius himself does not say much on the subject of *bonorum possessio*, assigning as his reason that he had dealt with the

topic in an independent treatise, now unfortunately lost.

³ *Just. Inst.* I. II. 2.

⁴ *Inst.* III. 9. 7.

⁵ See note on *Inst.* III. 9. 7, p. 273.

We now proceed to speak of the other scheme of tabulation.

(a) *Bonorum possessio adjuvandi juris civilis gratia* would be granted to heirs appointed in a testament absolutely without flaw; or, in default of a testament, to *sui heredes*, born and after-born¹, and to *legitimi heredes*. Also as a matter of course to the *qui ex legibus*, &c.; for here the Praetor had no discretion left to him, but was positively directed to grant possession.

(b) *Bonorum possessio emendandi vel supplendi juris civilis gratia*, as Mühlenbruch observes², was introduced to prevent *usucapio lucrativa*³, whereby the property of the deceased would have passed into the hands of strangers and the sacred rites of the family have been intermitted. Hence it was that the Praetor granted the *bonorum possessiones* called "*unde cognati*" and "*unde vir et uxor*." From the same wish on his part to prevent a person dying utterly without heirs, the *bonorum possessiones* styled "*tum quem ex familia*," "*patrono et patronae, liberisque eorum et parentibus*," and "*cognatis manumissoris*," were introduced. But the three last-named, having been abolished by Justinian⁴, are only of antiquarian interest.

The effect of a grant of *bonorum possessio* was that the recipient became "*in loco heredis*;" could demand the interdict "*Quorum Bonorum*" to recover the items of the inheritance from any person detaining them⁵; and could sue and be sued by *actiones fictitiae* wherein he was assumed to be heir⁶.

Still the *heres* by the civil law, who had neglected to claim *bonorum possessio* within the time appointed, or who could not do so in anticipation of the person put into possession, because his claim was recognized under a subsequent title in the Praetorian scheme, might wrest the inheritance from the *bonorum possessor* (except in the cases specified under the third class below) and make that person's *bonorum possessio* valueless, or, to use the technical phrase, *sine re*⁷. But if the *bonorum possessor* had held the goods long enough to complete usucapion, the *heres* was without remedy.

(c) *Bonorum possessio impugnandi vel corrigendi juris civilis gratia* was in some cases introduced by the Praetor, in others by Imperial Constitutions. The Praetor, for example, granted *bonorum possessio* to the persons nominated as heirs in a testament duly sealed with the seals of seven witnesses, and yet defective in some minor formality; and this protection was extended by a rescript of M. Aurelius to certain cases where the Praetor had scrupled to interfere; so that the appointed heirs had in such instances a preference even to the nearest agnates⁸. The Praetor also allowed emancipated descendants to participate with *sui heredes* in the inheritance of their ancestor in virtue of the *bonorum possessio unde liberi*, and thus set the civil law at defiance. And, for a last example, Hadrian broke the well-established rule that "a testament once void is always void," by enacting that if a *postumus* died before the ancestor whose testament had become *ruptum* by his birth, the appointed heir should succeed *ex testamento*⁹.

The species of *bonorum possessio*, to which we have twice alluded in this note under the name of "*tum quem ex familia*," is frequently designated "*tamquam ex familia*." It is true that the latter appellation correctly

¹ Gaius III. 4; Just. Inst. III. 1. 8.

² Note on Heineccius's *Syntagma*, III. 10 § 2.

³ Gaius II. 52—56.

⁴ Just. Inst. III. 9. 5 and 6.

⁵ D. 43. 2.

⁶ Gaius III. 32; IV. 34; Ulpian XXVIII. 12.

⁷ Gaius II. 148, 149; III. 35—37; Ulpian XXVIII. 13.

⁸ Gaius II. 119, 120.

⁹ D. 28. 3. 12. pr.

expresses the fact that the agnates of the patron were called in on the fiction of their being agnates of the freedman also, the Twelve Tables having allowed them no inheritance *ex jure patronatus*: but the expression "*tum quem ex familia*" is more likely to be the commencement of the clause in the edict which admitted these persons; and so we believe it to be the classical phrase, seeing that the majority of the other classes are designated by the quotation of a part of the wording employed in the *album*; thus we have the classes "*unde liberi*," "*unde legitimi*," &c., the abbreviations for "*ea est pars edicti unde liberi (aut legitimi) vocantur*;" and in like manner in the present case the sentence probably ran "*tum quem ex familia patroni proximum oportebit vocabo*."

L. On the Classification of Obligations.

Obligations according to the Roman law are divided into (A) Natural and (B) Civil.

A. Natural obligations again are divided into (a) those which the civil law absolutely reprobates, and (b) those on which an action cannot be founded, but which can be used as an exception or ground of defence: *nuda pacta*.

B. Civil obligations are also subdivided into (a) civil obligations in the strictest sense, i.e. obligations furnished with an action by the civil law. (β) praetorian obligations, which are enforced by an action granted through the later legislation of the Praetor's edict.

(a). Of these civil obligations in the strictest sense there are two subdivisions, viz. (I.) those which are altogether unconnected with the *jus gentium* and based on the civil law only, *legibus constitutae*; (II.) those recognized by the *jus gentium*, and received into and furnished with an action by the civil law, *jure civili comprobatae*.

Under (I.) we may classify (1) obligations springing from contracts *stricti juris*, which were actionable because entered into with special forms which the civil law prescribed: (2) obligations by delict: (3) what were called *obligationes ex variis causarum figuris*, arising chiefly from quasi-contracts or quasi-delicts, but not entirely confined to these.

Under (II.) we may range (1) contracts of the kinds styled real and consensual: (2) two descriptions of pact (see A. b. above), of which the law took cognizance in later times, viz. *Pacta adjecta* and *Pacta legitima*, an explanation of which will be found below.

A real contract is one wherein execution by either party is a ground for compelling execution by the other: a consensual contract is one which binds both parties immediately upon their settlement of the terms.

(β). The praetorian obligations were all *comprobatae*, or in other words bound men naturally even before the law of Rome recognized their validity; and the only fact which prevented them from being contracts in the fullest sense, and falling under II. 1. above, was that their formal recognition was to be found in the *edictum praetorium* and not in *leges*, *senatusconsulta* or *constitutiones*. These were chiefly those called *constitutum pecuniae*, i.e. a promise to pay a debt of our own already existing according to natural law, but not enforceable by action, or to pay a debt, legal or moral, of another person; for the exaction of which, after the promise had passed, the Praetor in his edict furnished an action; *praecarium*, a grant of the use of a thing

tio

Civilis (sensu stricto)

- (β) Praetoria
i. *Constitutum*
ii. *Precarium*
iii. *Receptum*

(1) Con

(3) Ex variis figuris

C. per aes et librum

i. *Nexum*

ctus

ges-

inci-

biti

Quasi-delictum

- i. *Dejectum et ef-*
fusum
ii. *Positum et sus-*
pensum
iii. *Damnum in na-*
vi aut caupo-
na
iv. *Litem suam fa-*
cere

Ex variis figuris

- i. *C. exercitorius*
ii. *C. institorius*
iii. *C. filifamilias*
iv. *Officium exhi-*
bendi
v. *Noxia*
vi. *Pauperies*
vii. *Damnum infec-*
tum
viii. *Factus*



during the pleasure of the grantor, who again could only recover possession by means of a remedy (the *interdictum de precario*) provided by the edict: and *receptum*, or the obligation of a tavern-keeper or ship-master to make good any damage, not purely accidental, which befell goods deposited with him in the course of his trade.

See Pothier on *Obligations*, translated by Evans, Vol. II. p. 406, and App. XVIII.

Dismissing these praetorian obligations, we will briefly indicate the species included under the genera numbered I. and II. above:—

Contracts *stricti juris* (I. 1, above) were either *verbal* or *literal*; the *verbal* being the *stipulationes*, *sponsiones*, *fidepromissiones* and *fidejussiones*, so fully described by Gaius (III. 92—127) and Justinian (III. 15—20); the *literal* bring the *nomina*, *chirographae* and *syngraphae*, as to which Gaius also says enough (III. 128—134) to render further particulars unnecessary here.

To these ought to be added, *nexum*, a contract solemnized *per aes et libram*; of which no mention is made by Justinian, its employment being in his day a thing of the past.

The obligations from delict (I. 2, above) were fourfold, as Justinian tells us (IV. 1—4), arising either from *furtum*, *rapina*, *damnum injuriæ datum*, or *injuria*. To these may be added *amotio rerum* (D. 25. 2), and *dolus*. For although mischief willfully done could usually be prosecuted under some nominate action, the Roman law provided an *actio de dolo* to include any exceptional wrong.

As to the *variae causarum figurae* (I. 3, above), Justinian says but little, and that little indirectly and inferentially (e.g. in III. 91). We stated above that these *figurae* included two important branches, quasi-contracts and quasi-delicts: of the former subdivision we may bring forward especially the instances of *Negotiorum gestio*, business transacted for a man without his knowledge or consent, whereby a jural relation arises, which is described in detail by Mackeldey in his *Systema Juris Romani*, §§ 460—462; *solutio indebiti*, touched upon by Gaius and Justinian slightly, but as to which Mackeldey also gives full information in §§ 468—470; and lastly, *communio incidens*, a community of interest cast upon two or more persons without agreement of their own, for which we shall again refer the reader to Mackeldey, §§ 464—467.

The *quasi-delicts* were chiefly injurious acts of slaves or descendants, for which the master or ascendant was bound to make reparation, some of which are named by Justinian in *Inst.* IV. 5, 1 and 2; the act of a *judex qui litem suam facit* (IV. 5. pr.) is another instance.

The other *figurae* were obligations arising from the contracts of sons, slaves, and agents, remedied by the actions *id quod jussu* (*Inst.* IV. 7. 1), *exercitoria* and *institoria* (IV. 7. 2), *tributoria* (IV. 7. 3), *de peculio et de in rem verso* (IV. 7. 4), or from the delicts of sons and slaves or from mischief committed by cattle, remedied by the actions *noxalis* and *de pauperie* (IV. 8 and 9). To these we may add the obligation to produce or discover (*officium exhibendi*), which in certain cases attached upon one who had neither entered into a contract nor committed a delict (see Mackeldey, § 481); the obligation arising from *damnum infectum*, i.e. to furnish a *cautio* or submit to a *missio in possessionem*; and the obligation caused by *jactus*, when a part of the cargo was thrown overboard to save a ship in distress, and the shipowner and shippers had to make good to the owner of the sacrificed property a due proportion of his loss (see Mackeldey, § 482, on the *Lex Rhodia de Jactu*).

We now need only specify the chief contracts and *facts* giving rise to an action which fall under Class II. above, and our enumeration of obligations is completed.

Real contracts, then, are *mutuum*, a loan where the borrower has not to return the identical thing lent, but an equivalent: *commodatum*, a loan where the borrower has to return the identical thing he has received: *depositum*, a loan for the benefit of the lender, or in other words a deposit of a thing for the sake of custody; with which is classed *sequestratio*, the placing of a thing in the hands of some third person till its ownership is decided by a suit: *pignus*, a deposit as a pledge: *hypotheca*, a pledge without an actual deposit, but with one implied. Besides these there are certain contracts, which for want of a more specific name are styled *innominati*, and by the Roman lawyers are ranked in four subdivisions, viz., *Do ut des*, *Do ut facias*, *Facio ut des*, *Facio ut facias*; and the first of which, though called innominate, has a name, *permutatio*.

Consensual contracts are *Emptio Venditio*, *Locatio Conductio*, *Societas* and *Mandatum*, (treated of by Justinian in III. 22—26,) *Emphyteusis*, or a lease perpetual on condition of the regular payment of a rent, and *Superficies*, a lease of a similar character, but referring only to the building on a particular plot of land, and not affecting the land, and therefore terminated by the destruction of the building.

The contracts described as real or consensual are *bonae fidei*, that is to say, the magistrate who has to decide cases arising out of them may entertain equitable pleas or answers. So also are the quasi-contracts and quasi-delicts.

Pacta adjuncta and *Pacta legitima* (see II. 2 above) still remain to be mentioned.

The former are agreements attached to *bonae fidei* contracts, and regarded by the law of later times as forming part of the contract, so that on their breach an action may be brought. The principal varieties are an agreement that the vendor shall have a right of pre-emption in case the purchaser desires to resell (*pactum protimeseos*): the right of demanding a re-sale even against the will of the purchaser (*pactum de retrovendendo*): the right of the vendor to rescind a contract if a better offer be received within a specified time (*pactum additionis in diem*): the reservation of the rights of ownership till the price is paid (*pactum reservati dominii*): an agreement that no guarantee of the vendor against eviction of the purchaser shall be presumed (*pactum de evictione non praestanda*): *pactum commissorium* or *lex commissoria*, whereby the parties to a contract agree that either may rescind the agreement, if the other make delay, instead of pursuing him in damages: akin to which is an agreement that either party may within a certain time set the bargain aside (*pactum displicentiae*): finally, an agreement that the receiver shall not part with the thing received except by consent of the party who has delivered it (*pactum de non alienando*).

Pacta legitima are of various kinds, but the chief are the *pactum donationis* and that *de dote constituenda*. These again are too minute in their nature to be discussed in an elementary treatise, and we refer the reader desirous of information to Mackeldey, §§ 420—428.

M. On Dolus and Culpa.

Personal actions are either for the reparation of damage or for the exaction of a penalty incurred by reason of damage being inflicted: for even the actions styled *Ex contractu* are not, strictly speaking, on the contract, but on the damage arising from its breach.

Damage again is either positive or negative; positive when a man is deprived of some advantage which he has enjoyed; negative when he is prevented from acquiring a future benefit. *Id quod interest* is a phrase employed by Roman lawyers sometimes to denote the negative damage alone¹, sometimes to denote the aggregate of the damage positive and negative².

Damage may be caused (1) by accident; (2) by the act or omission of a free agent³; (3) by a combination of act and accident, or of omission and accident. Let us take these cases separately:

(1). Damage may be caused by accident, *casus*, i.e. by something which no human care could prevent: and in this case the sufferer has no right of action against any one, unless it be against an insurer who has guaranteed the reparation of loss.

(2). Damage may be caused by the lawful or unlawful act of a free agent, and may be either the intended or the unintended effect of the same.

If it be the effect, whether intended or unintended, of the lawful act, the sufferer has no action, for *qui jure suo utitur neminem laedit*.

If it be the intended effect of an unlawful act, it amounts to *dolus*; and *dolus* is always actionable, whether by one of the nominate actions provided for all ordinary delicts and breaches of contract, or by the general action *de dolo*: but there is a distinction to be noted, which in some cases affects the measure of the penalty inflicted, and that is, that *dolus* may be direct or oblique; direct when the mischievous consequence was desired as well as intended; oblique or indirect when it was not desired and yet was intended; by which we mean that it was adverted to as a possible concomitant or alternative of the result aimed at.

If it be the unintended effect of an unlawful act, the Roman Law always considers the original illegality to taint even its unforeseen consequences. Still there is no *dolus*, *dolus* being equivalent to *intent*; but there is *culpa lata*, or gross culpability, and the actions are the same as if *dolus* had existed, for *culpa lata dolo aequiparatur*.

This *culpa lata* may be chargeable on the wrong-doer in two distinct cases; viz. 1st, where he acts *heedlessly*, i.e. where he does not at all advert to some probable consequences; 2nd, where he acts *rashly*, adverting to the probable consequence, but through hasty and insufficient consideration dismissing the idea of its following in the particular instance.

(3). Damage may be caused by the lawful or unlawful omission of a free agent; and, as in the case of an act, the damage may be the intended or unintended effect of the same.

When the omission is lawful, there can be no liability to action, whether the consequence be intended or not; for, as before, *qui jure suo utitur neminem laedit*.

If the damage be the intended effect of an unlawful omission (which is technically called a *forbearance*; as in fact is every omission, lawful or unlawful, when coupled with intent), there is obviously *dolus*, and of course a right of action springs up.

If it be the unintended effect of an unlawful omission (technically described as *negligence*), the offender is chargeable with *culpa lata* if he has shewn less diligence in matters affecting other people than he usually

¹ D. 50. 17. 19. 3.

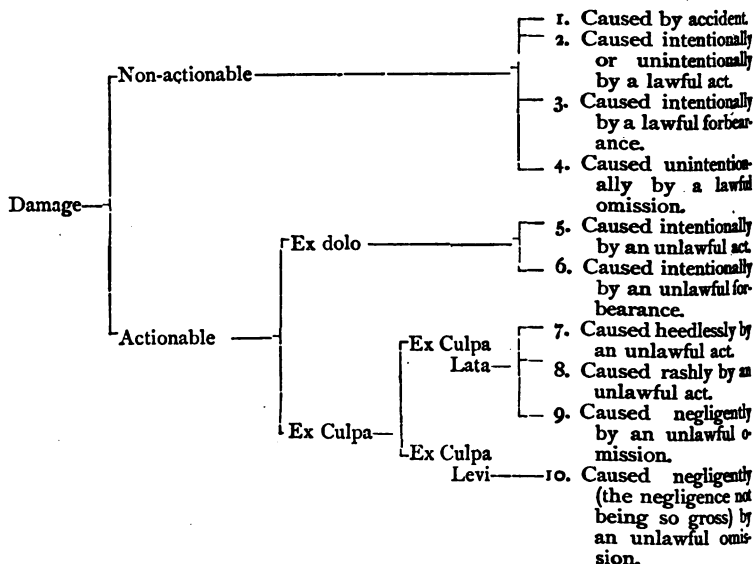
² D. 19. 1. 1. pr.: D. 12. 3. 8.

³ The act or omission of one under con-

straint is *casus* so far as he is concerned, although it may be *dolus* or *culpa* on the part of the constrainer.

exhibits in his own business, and with *culpa levis* (or in some cases with *culpa lata*) even if he employed his average diligence.

(4). When damage arises from a mixture of act and accident or of omission and accident, the act or omission is considered to characterize the whole complex result.



On the topics here discussed the reader will gain information from Mr Campbell's excellent treatise on the Law of Negligence.

N. On the Aquilian Stipulation.

We are informed in the Institutes¹ that Aquilius Gallus drew up a comprehensive form whereby any obligation whatever could be *novated* and thrown into the shape of a stipulation; so that *acceptilation*, a method of dissolving obligations properly applicable to those of the verbal species alone, might become universal in its scope.

The stipulation is quoted verbatim in the passage referred to, and stands thus: "Quicquid te mihi ex quacumque causa dare facere oportet, oportebit, praesens in diemve, (aut sub conditione,) quarumque rerum mihi tecum actio, quaeque abs te petitio, vel adversus te persecutio est, erit, quodve tu meum habes, tenes, possides, possedisti, dolove malo fecisti quo minus possideas: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spondedit Numerius Negidius."

Causa includes every possible variety of business and obligation, for Ulpian tells us²: "Certi conductio competit ex omni causa et ex omni

¹ III. 29. 2.

² D. 12. 1. 9. pr.

obligatione ex qua certum petatur:" and if there were any doubt as to *causa* comprehending obligations by delict, this would be set at rest by reading two excerpts, one from Gaius and the other from Ulpian, which the compilers of the Digest have, evidently with a purpose, placed in immediate sequence¹.

Oportebit is to be read in close connection with the sentence following: "*praesens in diemve (aut sub conditione)*:" and we may remark in passing that the words "*aut sub conditione*" are absent from a large proportion of the MSS., and are not absolutely necessary, seeing that *in diem* may be understood to signify *in diem certum vel in diem incertum*, and a condition and a *dies incertus* are convertible terms. We must not argue from the presence of the word *oportebit* that it was possible to novate by anticipation all or any future obligations which might arise between the parties: the obligation novated must be an existing one, but there was no necessity that its fulfilment should be already exigible (*dies venit*), or even that the creditor's right should have vested (*dies cedit*). This point is brought out clearly by the employment of the words "*praesens, in diemve (aut sub conditione)*:" for *praesens* denotes an obligation of which we can predicate: "*et cedit et venit dies*;" *in diem (certum)* one of which we can say: "*cedit dies sed nondum venit*;" whilst *in diem (incertum)* or *sub conditione* may be thus described: "*neque cedit neque venit dies*."

The stipulation, having now included every variety of obligation, proceeds to enumerate every legal remedy, in the words *actio, petitio, persecutio*.

The application of these terms is not uniform in the Sources. Those jurists who are careful in the use of their terms adhere to the distinctions laid down by Ulpian, who says "*actio* is equivalent to *actio in personam*, *petitio* to *actio in rem*, whilst *persecutio* is an extraordinary proceeding (i. e. one where there was no *formula* or *iudex privatus*, but the Praetor decided summarily), such as that adopted in suits about *fideicommissa*, &c.² But although *persecutio* is seldom, if ever, used otherwise than as Ulpian states, *actio* and *petitio* are frequently treated as convertible; e. g. in the Rubric to D. XII. 1, "*de rebus creditis, si certum petatur et de conditione*," where *condictio* and *certi petitio* are synonyms for the same remedy: also in several *senatusconsulta*, e. g. the *Senatusconsultum Macedonianum*³ and the *Senatusconsultum Velleianum*⁴; but *senatusconsulta* are no better indices to the correct use of legal phrases than our own Acts of Parliament. *Actio*, however, even in the writings of lawyers, sometimes includes *petitio*; but *petitio* does not properly include *actio*; and this we gather from the passage of Ulpian already quoted⁵.

The words "*quodve tu meum habes, &c.*" give a complete list of the various possessions on which may be founded an *actio in rem*; and if *petitio* or *formula petitoria* had been the only method of proceeding *in rem*, Aquilius would here be encumbering his stipulation with mere surplusage. But, as Gaius tells us⁶, there were two species of real action; one of which, viz. *petitio*, was available only when the plaintiff could assert a Quiritary title, *jus Quiritium*; whilst the other, *per sponsionem*, was of universal application. Hence the Aquilian stipulation would not have been fully comprehensive unless the last-named form of action had been included; and as it originated from a variety of detentions or possessions, continuing or past, on the part of the defendant, the whole of them are specified in detail.

Thus *habere* is not used in its widest sense; wherein it comprises the

¹ D. 50. 16. 11 and 12.

² D. 50. 16. 178. 2.

³ Quoted in D. 14. 6. 1.

⁴ Quoted in D. 16. 2. 1.

⁵ D. 50. 16. 178. 2.

⁶ IV. 91-93.

holding on claim of ownership, or of civil possession protected by interdicts and tending to usucapion, or of mere detention unprotected by interdicts and not tending to usucapion; but it is used as simply indicating holding on claim of ownership: *possidere* means the holding on claim of judicial possession, and *tenere* the assertion of a right of mere detention, as in cases of deposit, &c.

That these are the technical meanings of the above words is clear from the passages in the Digest. For, as proving that *habere* is sometimes the general expression, we may cite: "*habere dupliciter accipitur; nam et eum habere dicimus qui rei dominus est, et eum qui dominus non est sed tenet: denique habere rem apud nos depositam solemus dicere*¹," and a well-known passage² where *habere* is applied to detention on claim of property, of deposit, loan and pledge, of a right of usufruct or use; and also because the article is alleged to have been lent; several of which claims clearly found only a right of detention and not one of civil possession. And as shewing that *tenere* and *possidere* are distinct notions we have: "*qui in aliena potestate sunt, rem peculiarem tenere possunt, habere et possidere non possunt, quia possessio non tantum corporis sed et juris est*³."

As to the words "*possedisti, dolove malo fecisti quominus possideas*," we have to remark that one who had wrongfully taken possession, and subsequently lost that possession intentionally (*dolo*) or through negligence (whether *culpa lata* or *culpa levis*), was actionable under the *Senatusconsultum Juventianum*⁴; and it is tersely laid down in the Title of the Digest, "*de verborum significatione*," that "*dolus* is equivalent to *possessio*," or in other words that one who has fraudulently put himself out of possession may be sued on the fiction that he still has possession.

Hence the analysis of the Aquilian stipulation shews that it includes without defect or excess every possible case of liability,

O. On the Classification of Actions.

It is proposed in this note to exhibit a classification of actions, and a brief summary of the principal rules connected with them. And by actions we here denote "private" actions, which only Cicero clearly and simply distinguished from "public" actions in the words: "*omnia judicia aut distrahendarum controversiarum, aut puniendorum malefactorum causa repleta sunt*⁵."

The definition of action, i.e. of a private action, is given in the text of the Institutes, viz. "the right of recovering by trial in court whatever is due to us," *jus persequendi iudicio quod sibi debetur*⁶; or, in other words, the power of compelling our opponent to submit to a judicial inquiry, with the view of obtaining from him, if we prove successful, the performance of his duty or obligation towards us, or compensation or a penalty for his non-performance thereof.

He who set in motion this remedial machinery was called *actor*, or sometimes *petitor*: he against whom it was directed was usually styled *reus*, and occasionally *possessor*. The position of the *reus* was more advantageous than that of the *actor*, because the burden of proof was thrown upon the

¹ D. 45. 1. 33. 9.

² D. 43. 16. 1. 33.

³ D. 41. 2. 49. 1.

⁴ D. 6. 1. 27. 3; D. 5. 3. 20. 6.

⁵ Cic. *pro Cluentio* 2.

⁶ *Inst.* IV. 6. pr.

latter; and on his failure to establish a case, the former was discharged, even though he brought forward no evidence¹.

Every action had its proximate cause in a fact, i. e. in an act or omission, its ultimate cause in a law forbidding the fact.

No person was compelled without his will to bring an action or institute an accusation against another². But, on the other hand, no man was debarred from bringing an action, provided he answered the description of the person for whose benefit and protection the action had been granted, and was under no disability which prevented him from administering his own property and pursuing his own rights. This last saving-clause debarred pupils, lunatics, &c., from being plaintiffs.

Originally a plaintiff was compelled to prosecute his own suit; the right of employing an agent having been of slow and gradual growth in Roman Jurisprudence. Still one instance of litigation by an agent was of immemorial allowance, viz. that for the protection of pupils and other disqualified persons, whose tutor (or curator)³ could bring an action in their name⁴. Subsequently it was permissible to appoint a *cognitor* to carry on a suit on behalf of a person not under disability, but his nomination had to take place in open court and in the presence of the opposing party⁵. Still later *procurators* were tolerated, these being agents appointed out of court, who could institute or defend a suit on their own mere allegation of a mandate to that effect from their principal, provided they furnished sureties that the latter would ratify their acts⁶. When this simpler kind of agent was recognized, the employment of *cognitors* naturally fell into disuse. Hence we have the statement in the Institutes: "*agere potest quilibet aut suo nomine aut alieno: alieno veluti procuratorio, tutorio, curatorio; cum olim in usu fuisset alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela*"⁷.

As to the method of procedure we shall not make many observations, seeing that we have treated of this topic at length elsewhere⁸. We merely remark that the history of trials at law and of pleading at Rome divides itself into three well-defined eras; viz. 1st, that of the *legis actiones*, lasting in full vigour to the time of the *Lex Aebutia*, A.U.C. 520(?)⁹, when certain classes of action became triable by *formulae*: and finally suppressed (except as to one or two species of suit) by the *Leges Juliae*, A.U.C. 708 and 729¹⁰; 2nd, the period of the *formulae*, as to which (as well as the former system) full information is given in the Fourth Book of the Commentaries of Gaius¹¹; 3rd, the period of the *judicia extraordinaria*, the *formulae* having been entirely suppressed in the reign of Constantine, A. D. 306¹².

We now proceed to the classification of the Roman actions; and this may be (1), according to the origin from which they spring; (2), according to the right in debate; (3), according to the purpose for which they are brought; (4), according to the amount sought to be recovered; (5), according to the amount of discretion allowed to the judge; (6), according to the time of limitation of the action.

¹ D. 50. 17. 125; C. 2. 8; C. 4. 19.

² C. 3. 7.

³ The tutor existed from the earliest times; the curator was a more modern creation.

⁴ One man could also sue on behalf of another in an action *pro populo* or *libertatis causa*; Gaius iv. 82.

⁵ Gaius iv. 83.

⁶ Gaius iv. 84.

⁷ iv. 10. pr.

⁸ See App. Q.

⁹ Warnkoenig suggests this year or 527. Heffter puts the *lex* later. Savigny will not commit himself to a precise statement, but inclines to an early date. See Savigny's *Traité du Droit Romain, traduit par Etienne*, p. 91.

¹⁰ See App. (N) to our edition of Gaius and Ulpian.

¹¹ Gaius iv. 10—52.

¹² C. 2. 58. 1.

I. When we classify actions according to the source from which they spring, they are divisible into "civil" and "honorary:" the former being processes for enforcing the enactments of the sovereign or subordinate legislative bodies at Rome, i. e. the prescribed rules of the Comitia or Senate in republican times, and those of the Emperor or Senate in later days; whilst the "honorary" actions were those which carried into effect judge-made law, whether it were law made by anticipation, such as the enactments of the Praetorian and Aedilician Edicts; or modifications of the civil law or of the Edict, introduced *pro re nata* by the Praetor as supreme dispenser of equity. Of these honorary actions the first-named variety, i. e. those based on the letter of the Edict, were *honorariae et directae, honorariae et vulgares*; whilst those allowed through an extension of the letter in conformity with the spirit of a written rule, or otherwise modifying the precise application of the rule, whether of the Jus Civile or the Edict, were *non vulgares* or *in factum*, and comprehended three varieties, viz. *actiones utiles* (including *actiones fictitiae*), *actiones cum praescriptione* and *actiones in factum praescriptis verbis*. We need not enter into further explanation of these classes of actions, having already done so in the Appendix to our edition of Gaius and Ulpian¹. It is enough to remark that although the origin of the designations goes back to the formulary system, the distinctions themselves were founded upon first principles, and therefore outlived the suppression of the *formulae*: so that the names, having become established in practice, were still retained after their precise etymological application had ceased.

II. When we look at the right or rights in dispute we get another classification of actions into *actiones in rem*, *actiones in personam*, and *actiones mixtae*. By the first phrase is denoted the form of action wherein the plaintiff stated that some material object was his or that some particular right belonged to him as against the world: by the second is denoted the form of action wherein one person sued another for the infringement of an obligation which put the latter under a special duty towards the former: mixt actions, as their name denotes, partook of the nature of both the preceding varieties, but their resemblance to real actions was slight and imperfect, and they ought rather to be classed with *actiones in personam*, for they all originated from quasi-contracts.

The real actions were as follows:

- (1) *Rei vindicatio*, properly so called²;
- (2) *Actio in rem confessoria*; in claim of servitudes³;
- (3) *Actio in rem negatoria*; in denial of another's claim of a servitude⁴.

These three were civil actions: and there were also six honorary; viz.

- (4) *Actio Publiciana*; where an incomplete usucapion was treated as complete⁵;
- (5) *Actio Publiciana rescissoria*: where a complete usucapion was treated as incomplete⁶;
- (6) *Actio Pauliana*; to set aside fraudulent alienations by bankrupts⁷:

¹ App. (Q) to our edition of Gaius and Ulpian.

² IV. 6. 1.

³ IV. 6. 2.

⁴ IV. 6. 3.

⁵ IV. 6. 4.

⁶ IV. 6. 5.

⁷ IV. 6. 6.

(7) *Actio Serviana*; to enforce a landlord's hypothec on his tenant's goods¹:

(8) *Actio quasi-Serviana*; to enforce other pledges and mortgages²:

(9) *Actio praejudicialis*; to settle a fact as a preliminary to further litigation³.

We have classed the *actio praejudicialis* with the praetorian real actions, because all its varieties, with one exception, were honorary; such as the *actio de ingenuitate*, to decide whether a person were free-born or not, or the *actio de partu agnoscendo*, to settle a question of parentage⁴; and those also which were brought to define the amount of the *res litigiosa*, as for instance "quanta dos sit," named by Gaius⁵: one *actio praejudicialis*, however, as Justinian himself tells us⁶, was of civil origin, namely the *actio de libertate*, commonly called *liberalis causa*.

Personal actions arose (1) from law, (2) from equity, (3) from contract, (4) from delict, (5) from quasi-contract, (6) from quasi-delict. To catalogue the actions falling under the last four heads would be not only tedious, but useless, for each contract and delict had its own special action, and therefore a list of the actions would be a mere recapitulation of the list of forms of obligation set down in App. L. The *actiones ex lege* were actions to which a person subjected himself by his own mere act, and therefore differed little from actions on delict or quasi-contract. Those *ex edicto* were chiefly the *actio ad exhibendum* and the well-known *restitutio in integrum*.

Justinian does not say very much about personal actions in the Sixth Title of Book IV., possibly because he had mentioned so many of them already in his remarks upon Obligations; and the few of which he therein takes notice are praetorian, viz. the *actio de pecunia constituta*⁷, the *actio de peculio*⁸, and the *actio de iurejurando*⁹; (the first-named falling under the head of obligations from contract, the second and third being purely *ex edicto*;) also certain actions *ex delicto*, such as the *actio de albo corrupto: de in jus vocato sine impetratione: de in jus vocato vi exempto*¹⁰. He further tells us that there were many more honorary penal actions, among which of course he intended to include "*de servo corrupto*"¹¹, "*de calumnia*"¹², and, most important of all, the *actio in factum praescriptis verbis*, which could be employed not only to redress all wrongful or negligent acts not otherwise actionable, but to punish breaches of contract also, when the contract was innominate, either in the general or in the technical sense¹³.

Mixt actions were *petitio hereditatis* and the three partition-suits, viz. *finium regundorum: communi dividundo* and *familiae erciscundae*. These were partly personal, because they were maintainable only against persons of a specific description, and might involve money-payments; and partly real, because their avowed object was the recovery of a particular thing, the pecuniary compensation being merely incidental¹⁴.

III. In considering actions with reference to the purpose for which they were brought we obtain a triple classification, (1) *actiones rei persequendae gratia*, comprehending all actions *in rem* and the greater part of

¹ IV. 6. 7.

² IV. 6. 7.

³ IV. 6. 13.

⁴ IV. 6. 13.

⁵ Gaius IV. 44.

⁶ IV. 6. 13.

⁷ IV. 6. 9.

⁸ IV. 6. 10.

⁹ IV. 6. 11.

¹⁰ IV. 6. 12.

¹¹ IV. 1. 8.

¹² IV. 16. 1.

¹³ Sc. *Do ut des*, &c. See App. L.

¹⁴ IV. 6. 28; IV. 6. 20; IV. 17. 4-6.

the personal actions upon a contract¹: (2) *poenae persequendae gratia*, including some of the delict actions, e.g. the *actio furti*, and the penal actions *ex lege* and *ex edicto*; (3) *mixtae* (the term being used in a different sense from that in which it appears above); of which kind were the major part of the delict actions. Some actions *ex contractu* and many of those *quasi ex contractu* also became *mixtae*, if the liability were denied².

IV. The amount sought to be recovered is made by Justinian another ground for classification, but it is so closely connected with the division last dealt with, and Justinian treats of it so fully, that we may safely omit its discussion, and pass on to the next topic.

V. One of the most important divisions of actions is that which depends upon the extent of the judge's power; under which classification we have (1) *actiones stricti juris*; (2) *actiones bonae fidei*; (3) *actiones arbitrarie*³.

In a *stricti juris* action the judge could not take account of anything collateral to the principal issue; whereas in a *bonae fidei* action he had full discretion to take a wider and more equitable view of the subject⁴. Hence the opportunity for introducing the principle of set-off; so that a balance of conflicting claims might be struck, and the defendant condemned merely in the amount of the difference. Hence, too, the judge in *bonae fidei* actions could under the formulary system take account of *dolus*, *metus*, *pactum*, *conventum* and other equitable defences, even though they had not been put in as *exceptiones* by the defendant when *in iure* before the Praetor; whereas in a *stricti juris* action, these defences could be raised *in iure* alone, and if not set down in the *formula* were beyond the cognizance of the *judex*. In the later system of the *judicia extraordinaria* the technicalities of the pleadings were abolished, but the principle still remained that in a *bonae fidei* action a much larger number of pleas were open to the defendant than in an action *stricti juris*: and of course what was true of *exceptiones* was true also of *replicationes*, *duplicationes* and in fact of the whole system of pleading.

Justinian gives us a list of *bonae fidei* actions which with a little rearrangement stands as follows⁵: *commodati*; *depositi*; *pigneratitia*; *praescriptis verbis ex permutatione*; *ex emplo vendito*; *ex locato conducto*; *pro socio*; *mandati*; *negotiorum gestorum*; *familiae erciscundae*; *communi dividundo*; *tutela*; *ex aestimato*; and the *petitio hereditatis*. Thus we perceive that the actions which were sued out *ex bona fide* were (1) all the real contracts except *mutuum*, (2) all the consensual contracts, (3) the quasi-contracts, for under *negotia gesta*, *communio incidens*, and *tutela* are included all that are of great importance, except *indebitum* (which is *stricti juris*), (4) the praetorian pacts, of which *ex aestimato* is given merely as example; for *actiones praescriptis verbis* flowed so entirely from the Praetor's equitable jurisdiction, that we may safely ascribe a *bona fide* character to the whole of them, and lastly (5) *petitio hereditatis*, about which there had once been doubt; because it was so closely akin to a real action that some jurists had assigned that character to it, and not included it amongst the mixt actions, as we have done above in accordance with the other school of jurisprudence.

The *stricti juris* actions are, (1) actions *ex delicto* and *quasi ex delicto*; (2) actions on verbal and literal contracts; the *actio mutui* (on a real con-

¹ IV. 6. 17.

² IV. 6. 17, 19, 24.

³ IV. 6. 28.

⁴ IV. 6. 30.

⁵ IV. 6. 28.

tract), and the *actio indebiti* (on a quasi-contract); (3) actions *ex lege*. Hence we perceive that *stricti juris* actions were those in which the remedy was by *condictio*, properly so called, i.e. an action brought to enforce an unilateral obligation¹. The only apparent exception is the *actio ex stipulatu de dote exigenda* (which was *bona fide*), but it is clearly explained by Justinian himself that this action was not really on a stipulation, but on the presumption of a stipulation².

The *actiones arbitrarie* were (1) real actions, (2) the actions *de dolo*, *quod metus causa*, and *de eo quod certo loco promissum est*, (3) the *actio ad exhibendum*, &c.: and in these the judge had power to issue an alternative award to the effect that the defendant should make specific restitution, reparation or production, and in case of his inability (not of his unwillingness) should pay instead damages estimated *ex fide bona*.

To this list of *arbitrarie actiones* extracted from the Institutes, we may further add (4) noxal actions; (5) the *actio finium regundorum*; (6) the *actio rerum amotarum*, and (7) all actions *ex interdicto*.

VI. There is one more division of actions which calls for a word or two of notice: that of actions *perpetual* and actions *temporary*: and here the distinction of civil and honorary actions is all-important, for in the latter the Praetor's duration in office was originally the period of limitation, and afterwards a space of twelve months from the arising of the cause of suit³. Civil actions, on the other hand, were at first perpetual; but though they still bore this designation even in Justinian's days, they were really terminable, in consequence of a decree of Honorius and Arcadius, issued in A.D. 424: but their time of limitation continued to be much longer than that of the honorary actions, extending to 30 or in some cases to 40 years. The list of temporary actions was, however, very much reduced by the rule which crept in *ex auctoritate prudentium*, that all honorary actions which were *rei persecutoriae* and not directly at variance with the civil law⁴ should be perpetual; hence the real and contractual actions had their time of limitation enlarged; and only delict actions (except the *actio furti manifesti*)⁵ and a few others remained annual.

P. On Concurrence of Actions.

The subject of concurrence of actions is one of considerable importance in the English as well as the Roman system of Jurisprudence. It is discussed as a matter of course in most of the treatises on the Roman Law; and in the works of Warnkœnig, Mackeldey, and Mühlenbruch, the reader will find the rules and principles connected with it set down and examined. But nowhere is the subject presented in a clearer light than in Thibaut's System of Jurisprudence.

In the very able translation of that work by Mr Justice Lindley the principles on which the law relating to the concurrence of actions depends, so far as the Roman system is concerned, are tersely stated⁶. Inasmuch,

¹ It should be observed that Puchta (*Cursus der Institutionen* II. p. 121) maintains that delict actions were not *stricti juris*: but Savigny clearly proves they were. See Savigny's *System* v. 475, 567. The action on the Lex Aquilia is called a *condictio* in D. 12. 1. 9. 1.

² IV. 6. 29.

³ IV. 12. 1.

⁴ D. 44. 7. 35. pr.

⁵ IV. 12. pr.

⁶ Lindley's *Jurisprudence*, § 70, pp. 61–63.

however, as the work to which we refer is now out of print, and the prospect of a second edition somewhat remote, and inasmuch as these principles as well as the corresponding rules of the English Law deserve special notice, we have, with the permission of the learned translator and editor, extracted them.

The law of concurrence, so far as it is to be found in the Roman Sources, depends on the following principles:

In the first place concurrence is of two kinds, objective and subjective.

1. *Subjective* concurrence takes its name from the fact that the subjects of the rights in dispute, i.e. the parties, are under consideration. If then in consequence of a multiplicity of plaintiffs or defendants there arose a multiplicity of actions, the rule of the Roman Law was that all these actions might be maintained simultaneously or successively.

For instance, the wife of A, being at the time under the *potestas* of her father B, was injured by C. Here there were three actions maintainable against C; one by A, another by B, and a third by the injured woman; and all three might have been carried on simultaneously or consecutively¹. Or again, A's slave was killed or wounded by three of B's slaves. Here A had three separate actions against B, maintainable simultaneously or consecutively, on the principle, "*tot injuriæ quot personæ injuriæ faciuntur*."² But there were two exceptions to the rule: viz. firstly, that as regarded principals and sureties the actions were only successive and not simultaneous; secondly, that in some cases satisfaction by one of several sureties discharged the others from their liability.

2. By *objective* concurrence is meant that the objects aimed at, i.e. the modes of redress, are under consideration; and when one person had several actions against another, there would be two cases possible, namely, (a) the objects of the actions might be essentially different, (b) they might be essentially the same.

(a) If they were essentially different, and the plaintiff succeeded in one of the actions, he could still proceed with the others, unless the ground of one was destroyed by that of the other. For example of this exception, a person who sought to recover at law from the heir named in the testament the amount of the testator's bequest to him, was assumed to have approved of the testator's dispositions; and so it was held that a disinherited son, by commencing an action for the recovery of a legacy against the instituted heir, was estopped from resorting to the *actio de inofficioso testamento* with the view of getting the testament set aside; in other words, the action for the recovery of the legacy could not concur with the *judicium inofficiosi testamenti*³.

As a consequence of the rule enunciated, all actions *rei persecutoriæ* were maintainable in succession if their grounds were different; so also were *actiones poenales*, and *actiones rei persecutoriæ* in combination with public or private penal actions. Where, however, the actions were by law given only alternatively, one of them destroyed all the others; and this happened when there was a concurrence between actions for public and private penalties.

When the plaintiff was unsuccessful in one of several actions with objects essentially different (such action having been tried on its merits), the others were maintainable so far as they rested on different grounds, but

¹ D. 47. 10. 1. 9.

² D. 47. 10. 34.

³ D. 5. 2. 12. 1; D. 5. 2. 8. 10.

no further. Hence, when a person had separate remedies for the same breach against an *exercitor* and against one of the crew of the vessel, a judgment obtained against the latter might be pleaded by way of defence if an action were brought against the former¹. In the event of the plaintiff abandoning the action which he had brought in the first instance, he might go on with the others, although he was estopped from resorting again to the one so abandoned.

(b) If the objects were essentially the same, and the plaintiff was successful in any one action, the others were not maintainable, unless some further advantage remained to be acquired, the obtaining of which had not become impossible by the result of the first action. If, however, the plaintiff was unsuccessful in the action he had instituted, or if he abandoned it, the other actions were maintainable if founded on a different ground; but not if founded on the same ground.

As the learned editor points out in his note to the passages above quoted, the doctrine of concurrence is closely allied to that of the *exceptio rei judicatae*; the same consideration of identity of object enters into both, but in the latter the further consideration of identity of cause of action is important.

The rules of the Roman Law being as above stated, perhaps a few words on the English doctrine will not be out of place. Here again our authority will be Mr Justice Lindley's "Introduction to the Study of Jurisprudence²." In the English Law then

1. An act which amounts to felony cannot be made the ground of any civil judicial proceedings against the person committing it, until he has been prosecuted for the felony³.

2. A person may at the same time proceed both at law and in equity against another to enforce two rights which, not being inconsistent, are distinct in their nature, although they arise from the same transaction⁴.

3. But, except in the case of a mortgagee, who may simultaneously pursue all the remedies open to him, no person can at the same time proceed both at law and in equity to gain what is substantially the same object; although if he fail at law he may afterwards sue in equity⁵.

4. Where at law several modes of proceeding are applicable to the same case the person aggrieved may adopt which he likes. If he is successful he cannot, although discontented, resort to any of the others; nor can he if he is unsuccessful; unless indeed his failure has left the merits of his case still unascertained.

¹ D. 9. 6. 4. 4. ² App. p. xlviii.

³ See as to this Broom's *Common Law*, p. 100, 1st edition.

⁴ See *Royle v. Wynne*, 1 Craig and Phill. 252.

⁵ But now as to the concurrent administration of law and equity, see the Supreme Court of Judicature Act of 1873, section 24; and as to § 4 below, see especially sub-section 5 of Section 24.

Q. On Civil Judicature and Procedure under Justinian.

The history of civil judicature and procedure amongst the Romans naturally divides itself into three well-marked epochs; (1) the period of the *legis actiones*, (2) that of the *formulae*, (3) that of the *judicia extraordinaria*.

Gaius gives us a full account of the two systems first named, although his description of the *legis actiones* is unfortunately somewhat mutilated; but the practical working of the *judicia extraordinaria* is nowhere described in detail, and the incidental allusions scattered through the Sources are so full of difficulties and apparent contradictions, that this ultimate form of judicature and procedure has been a theme for controversy in every age since the revival of classical learning.

As it is not our intention to recapitulate what is plain and undisputed, but rather to strive to piece together and harmonize the remarks of the jurists on the obscurer topic, we shall dismiss the earlier judicial systems with a few words, and so pass on to the consideration of the final development of judicature and procedure in the Eastern Empire.

I. The most ancient system, then, of which we find record is the highly technical one of the *legis actiones*, spoken of in the Fourth Book of Gaius' Commentaries¹. The *legis actiones* were five in number, three being forms for prosecuting original suits, the other two summary processes of execution whereby the magistrate gave effect to a judgment already obtained. The original actions, *per sacramentum*, *per judicis postulationem*, and *per condictionem*, appear to have varied only in certain technical ceremonies (but these, be it noted, were all-important in the eyes of the ancients), and to have been alike in the circumstance that the presiding magistrate remitted the investigation of the evidence to a *judex* or body of *judices* (i.e., as we should style them, a jurymen or juryman), according to whose finding sentence was pronounced. In the very earliest days it may possibly have been otherwise, the magistrate deciding the whole case in a summary manner without reference; but at any rate we can assert that the separation of the functions of magistrate (Praetor) and *judex* was fully established by the Lex Pinaria², about B.C. 350, in all *legis actiones per sacramentum*; and the very names of the other ancient processes, *per judicis postulationem* and *capiendi judicis* (the latter afterwards styled *per condictionem*), would indicate this division to have been characteristic of their procedure also, even if we had not the express testimony of Gaius to the same effect³.

II. Hence when the office of Praetor was established in B.C. 366, and that official began to transmit *formulae*, or instructions, to the *judex*, wherein the issue of fact submitted to his investigation was set forth and the sentence he was to pronounce defined; the novelty was not in the employment of a private citizen as sifter of evidence, but in the issuing of written instructions for his guidance; and probably also in the empowering of him to give sentence according to his finding, instead of reporting that finding to the magistrate and leaving the latter to pronounce judgment. Still, we are not to suppose that the introduction of the formulary system at once caused an abolition of the *legis actiones*; although its advantages became so apparent that at length the Lex Aebutia was passed, possibly

¹ Gaius IV. 10—53.

² Gaius IV. 15.

³ Gaius IV. 18.

about B. C. 150¹, whereby *formulae* were substituted in the place of all *legis actiones per iudicis postulationem* and *per conductionem*. The *Leges Juliae*, of dates B. C. 46 and 25, are generally supposed to have converted a portion of the *legis actiones per sacramentum* into matters of *formulae*, but there is much dispute as to the amount of change which they effected, and no one holds that they abolished *legis actiones* entirely².

Hence at the commencement of the Christian era there were two forms of procedure coexistent at Rome, viz. the *legis actio per sacramentum* and the formulary method, the former employed in the Court of the Centumviri, the other in that of the Praetor; and the long list of centumviral causes which Cicero gives shews that the old method of suing was still applicable to many of the most important matters of litigation³.

III. And simultaneously with the introduction of the *formulae* there had sprung up (or, it may be, there had revived) a third method of trial, viz. that *per iudicium extraordinarium*, wherein the Praetor acted as his own *iudex*, and settled a litigation without any reference at all. Nor is it difficult to see how this came about. In every action a considerable amount of technical business had to be transacted in the court of the Praetor prior to the issuing of a *formula* (as we have explained at large in App. (O) to our edition of Gaius and Ulpian), and the Praetor was able at any stage of these preliminary proceedings to quash the action. He might treat the *editio actionis* with silent contempt, or after hearing the plaintiff's *postulatio* he might, in consequence of a demurrer put in by the defendant, decline to issue a *formula*. Thus he could himself decide the case when the law was clear and the facts admitted; and it was but one step in advance to decide it if the facts were able to be reached by a quick and simple inquiry. Cases of any kind might be simple, cases of certain kinds must be simple.

Thus the *iudicium extraordinarium* crept in, and when it was once tolerated the magistrate's love of power would naturally induce him to extend it beyond its original limits; litigants would readily submit to an usurpation, so long as justice was fairly and speedily rendered; and legislation would ultimately recognize a useful though somewhat intrusive jurisdiction, and confirm the custom by specially remitting certain classes of suit to the *extraordinaria cognitio*. Zimmern in his admirable treatise on actions⁴ says that *iudicia extraordinaria* were almost coeval with the institution of the formulary procedure, but allowable only in special cases specified by the Praetorian Edict, or in later times by the Imperial Constitutions⁵, such as *restitutiones in integrum*⁶, *ventris inspectiones*⁷, questions relating to *fideicommissa*⁸ or *negotia gesta*⁹; and in all instances where there was a manifest wrong, for which neither the Jus Civile nor the Edict provided a remedy, such as the complaints of slaves against their masters, or those of children against their parents, demands for enfranchisement or maintenance¹⁰, claims for *honoraria*¹¹, &c. Thus the *cognitiones extraordinariae* gradually became

¹ This is the date assigned by Heffter in his Commentary on Gaius iv. 30. Warnkoenig would place the law earlier, Zimmern will not assert anything positively, except that the law was passed before the time of Cicero, but thinks Heffter's date somewhat too early.

² The total abolition cannot possibly be asserted, with Gaius (iv. 31) speaking so precisely in the negative.

³ Cic. *de Orat.* i. 38.

⁴ See particularly pp. 270—274 of the *Traité des actions chez les Romains, traduit par Etienne*; and compare Warnkoenig's *Institutiones* § 2084.

⁵ See for instance Tacitus, *Ann.* xiii. 51.

⁶ D. 4. 1.

⁷ Ulp. xxv. 12.

⁸ D. 3. 5. 47.

⁹ D. 25. 3. 5.

¹⁰ D. 30. 13. 1.

¹¹ D. 37. 9.

a substitute for the *formulae in factum praescriptis verbis* which the Praetor or in the provinces the Praeses, had been wont to issue, when neither law nor equity (i.e. *prescribed equity*, to use Blackstone's phrase) had provided a remedy.

These *judicia extraordinaria* or *cognitiones extraordinariae*, as time went on, trenched more and more on the *judicia ordinaria* or proceedings by *formula*; and we speak of the latter only, for we cannot help supposing that the process by *legis actio* had eventually died away; though we have no precise evidence on the point, but merely the inference from absence of reference to its existence.

The administration of justice at Rome was at all times the model copied by the *municipia*; so that in the Italic districts we find the *duumviri praefecti* imitating the Praetor in his assumption of summary jurisdiction. In the Provinces also the Praesides did the like¹. The Praefectus Praetoris and Praefectus Urbi gradually robbed the Praetor of the major part of his contentious jurisdiction in the city; and the *duumviri* and *praefecti* had their once extensive authority crippled by the *praesides* or *juridici*, whom later emperors appointed to administer the four newly-created provinces into which they divided Italy; but in both cases the modern magistrates took into their courts not only the business but the method of procedure of their predecessors. The *defensores* too of the provincial towns, when they were invested with the power of adjudicating in trivial matters, judged chiefly, or perhaps entirely, *extra ordinem*. So that through all the changes and transfers of judicial power, there was a steady progression towards making *judicia extraordinaria* universal.

In the reign of Diocletian the final blow was struck. The *formulae* system, or *ordo judiciorum*, was entirely abolished, in the courts of the provincial governors at any rate, and probably also in the courts of Rome and in those in the towns where petty cases were decided by the *duumviri* and *defensores*². And yet, although the *ordo judiciorum* was brought to an end, the *formulae* still subsisted, but in a totally new guise and for an entirely new purpose. They no longer served as an instruction to the jurymen, *judex privatus*, for that functionary had ceased to exist; but they were of use in marking out the exact point on which issue was joined, and they were also registered as records of the case³. Moreover their existence even in this altered form soon afterwards came to an end, Constantine issuing a rescript in the following terms: "*juris formulae aucupatione syllabarum insidiantes cunctorum actibus radicitus amputentur*"⁴. Thenceforward no formal *actionis postulatio*⁵ was required; the plaintiff stated his case in any form of words he pleased; and if he used the phraseology of the ancient *formulae*, this was done merely for the sake of precision, his verbal age being immaterial so long as his meaning was clear.

We have already indicated our belief that the suppression of the *judicia privati* took place simultaneously at Rome and in the Italic and Provincial courts. The settlement of this question is not, however, important, because the separation of the Eastern and Western Empires in A. D. 395 was speedily followed by the overthrow of the latter; and the Eastern empire consisted obviously of Provinces alone or with a small intermixture of districts possessing Italic privileges.

Hence in Justinian's time "all *judicia* were *extraordinaria*," and the word *judex*, whenever it occurs in the Code, Digest or Institutes is

¹ See App. H, on the Civil M. under Justinian.

² C. 3. 3. 2.

³ Zimmermann, *Tratât des A.* p. 273.

designation of an existing official, denotes a magistrate, superior or inferior, and not a *iudex privatus* or jurymen.

The judicial system in the middle of the sixth century was as follows: small litigations were tried by the municipal magistrates, from whom there was an appeal to the *praeses provinciae*¹ (*proconsul* or *legatus Caesaris*): the *praeses* was himself the judge of first instance in important suits, and the appeal from his decisions was to the *Praefectus Praetorio*². Thus the contentious jurisdiction of the *duumviri* and *defensores* was but small; but their voluntary jurisdiction was of great extent and importance³.

And now comes the important question, How could the *praeses* discharge his onerous duties when he was deprived of the assistance of the *iudices privati*, who under the formulary system had relieved him from the most tedious part of suits, viz. the examination into evidence? The same question may also be asked with reference to the *duumviri* and *defensores*. As to the *praeses*, whose case we will consider first, the answer is, that he was provided with two most valuable bodies of assistants, first, the *assessores* or *consiliarii*; second, the *iudices pedanei*.

The *assessores* were a body of skilled lawyers⁴, receiving a salary from the government⁵, and assigned as assistants to the provincial governor. They were not to be natives of the province in which they acted; but this rule was applicable only to the assessors of a *praeses*, and not to those of a *curator reipublicae*, i.e. a *duumvir* or *defensor*⁶. Their duties are summed up by Paulus in these words: "omne officium assessoris in his fere causis constat: in cognitionibus, postulationibus, libellis, edictis, decretis, epistolis⁷." In the *cognitiones* and *postulationes* they do not seem to have sat apart from the *praeses*, but to have been present with him in his court, and to have aided him with their advice. In the other matters above-mentioned their assistance would be even more valuable, as they could draft the documents named and then present them to the governor for his signature, to which practice Constantine alludes: "praesides non per assessores sed per se subscribant libellis⁸." Since the *consiliarii* were expressly forbidden to hear cases in the absence of the *praeses*⁹, their aid, though important in preventing him from falling into mistakes, would not relieve him from the necessity of hearing causes personally, and so, when overburdened with business, he had recourse to the other class of assistants allowed him by law, viz. the *iudices pedanei*.

A *iudex pedaneus* was a person to whom the *praeses* delegated his jurisdiction; and in the time of Diocletian the *praeses* could only thus remit cases for hearing by another when he was oppressed by an actual accumulation of business¹⁰; but afterwards under Julian delegation was allowed as a matter of course in certain actions of inferior importance¹¹, and could still be adopted as a measure of relief from overwork when larger causes were numerous in the provincial court.

¹ The *praeses* of Egypt was styled *praefectus Augustalis*; D. 1. 17: the *praesides* of the four Italian provinces, and of Alexandria, were called *iuridici*; D. 1. 20, Capitol. Marco, 2. *Praeses* is sometimes used as synonymous with *legatus Caesaris* and in opposition to *proconsul*; but more usually as a general appellation comprehending all varieties of provincial governors, and equivalent to *iudex ordinarius* or *rector*. D. 1. 18, 1.

² C. 7. 62. 32.

³ D. 50. 4. 18: C. Theod. 11. 31. 1. 3. Savigny discusses the extent of the voluntary jurisdiction of the municipal magistrates at considerable length in his *Histoire du Droit Romain au Moyen Age*, ch. 11.

⁴ D. 1. 22. 1.

⁵ D. 1. 22. 4 and 6.

⁶ D. 1. 22. 6. ⁷ D. 1. 22. 1.

⁸ C. 1. 51. 2.

⁹ C. 1. 51. 13: Nov. 60. 2.

¹⁰ C. 3. 3. 2.

¹¹ C. 3. 3. 5.

And here we must make a short digression to explain precisely what is the nature of the jurisdiction which the *praeses* could either as of course or on emergency delegate.

Jurisdiction in its wider sense denotes the whole measure of a magistrate's authority; and may be subdivided into *jurisdictio*, properly so called, and *imperium*. *Jurisdictio*, in this narrower sense, is equivalent to *notio*, and denotes the right of hearing a suit; *imperium*, on the other hand, signifies *jus coercionis et coactionis*, i.e. the power of punishing and restraining; and may be divided into *merum* and *mixtum*, the former being separable from *notio*, the latter inseparable¹. Thus *imperium merum* is the ability to carry out a sentence pronounced in a court of justice; *imperium mixtum* is the right to compel attendance of the parties and their witnesses, to maintain order in the court, &c., &c.²; and so also the ability to grant *bonorum possessio*, *restitutio in integrum*, &c., are instances of *imperium mixtum*, for these grants would be utterly nugatory if the magistrate himself could not at once enforce them³.

The jurisdiction of a magistrate, taking "jurisdiction" in its widest sense, was either ordinary or extraordinary, i.e. either possessed *jure magistratus* or conferred on him by some special enactment.

These distinctions are important in their bearing on our present topic, for we find on referring to the Digest that the following rules were well recognized:

1. That *jurisdictio extraordinaria* could not be delegated⁴;
2. That *merum judicium* could not be delegated⁵;
3. That *notio* might be delegated, either generally or with reference to certain persons and certain matters⁶;
4. That *imperium mixtum* of necessity accompanied a lawful delegation of *notio*⁷.

In those cases where delegation of jurisdiction was allowed, it was conferred on a *judex pedaneus*, if conferred at all. Some writers have maintained that this *judex pedaneus* was but a variety of *judex privatus*, special to the Provinces; basing their conclusion on the fact that such a functionary is mentioned by jurists who lived before *judicia extraordinaria* became universal. We should rather suggest that as *judicia extraordinaria* were gradually becoming prevalent long before Diocletian's decree was issued, the necessity of deputy-judges was felt and the want supplied whilst the ordinary and extraordinary systems of judicature were co-existent. It is, at any rate, difficult to believe that the *judex pedaneus* was nothing but a private individual before the suppression of the *ordo judiciorum*, and a magistrate immediately afterwards. And yet it is perfectly clear he was a magistrate in later days, having some of the functions of the ancient

¹ See Pothier's notes on D. 2. 1.

² Although the words *jurisdictio* and *imperium* are generally thus defined when the jurists bring them into contrast: yet it is as well to call attention to the fact that Ulpian sometimes used *imperium* in the sense of *plena jurisdictio*, or the power of a superior magistrate to adjudicate in all suits; and *jurisdictio* in the sense of *minus plena jurisdictio*, or the power of the municipal magistrates to deal only with

suits of minor importance. See examples of this use in D. 2. 1. 4; D. 50. 1. 26.

³ See D. 2. 1. 3.

⁴ D. 1. 21. 1. pr.

⁵ D. 1. 21. 1. 1.

⁶ D. 2. 1. 16.

⁷ D. 1. 21. 1. 1; D. 1. 21. 1. 5. To prevent misconception, we here mention that *restitutio in integrum*, and many varieties of *bonorum possessio*, could not be matters of delegation, because the *notio* thereof was *extraordinaria*.

praetor, as well as all those of the ancient *judex*: a *postulatio*, for instance, could be addressed to him¹, a *vocatio in jus* be returnable in his court²; both of them under the old system appertaining to the *Praetor* and not to the *judex*, proceedings, that is to say, *in jure* and not *in judicio*. In fact the very few passages, in which the *judex pedaneus* is mentioned by authors who wrote before the suppression of the *ordo judiciorum*, either leave his functions altogether undefined, or indicate that they were in some sort magisterial; in one of them, for instance, he is spoken of as appointing a tutor, an act clearly not appertaining to a *judex privatus*³.

Zimmern is of opinion that the *judices pedanei* were appointed from amongst the *curiales* of the towns within the province: his argument being (1) that the *curiales* had cognizance of trifling matters, and that the *judices pedanei* are described as functionaries "*qui humiliora negotia disceptant* ⁴;" (2) that in D. 26. 5. 3 it is said that tutors can be given by all municipal magistrates, whilst in the very next sentence, D. 26. 5. 4, it is added that neither the *Praetor* nor a *judex pedaneus* can appoint himself tutor; the obvious conclusion being that a *judex pedaneus* is a municipal magistrate. The second proof seems most conclusive; and as to the first we would merely suggest that Zimmern should substitute *duumviri* for *curiales*; unless he means to advocate the view entertained by Savigny that the *duumviri*, like the *praesides*, were oppressed with the amount of business devolving on them, and occasionally deputed the *curiales* to act in their stead⁵. Still we must not suppose that when the *praeses* conferred a delegated jurisdiction (*jurisdictionem mandavit*) on the *duumviri*, they could in their turn delegate the business to the *curiales*; for we are told expressly that a delegate cannot sub-delegate⁶; but they could delegate their own proper jurisdiction in minor matters, and act as deputies for the *praesides* in the more important cognizance of the latter. But though we scarcely agree with Zimmern that the *curiales* had any original cognizance of their own, we accept his statement that the *judices pedanei*, in the sense of deputy-judges, were not always *duumviri* or *defensores*, but occasionally ordinary members of the *curia*⁷.

Hence, to sum up our conclusions, the rules of judicature in Justinian seem to have been these:

A. The *praeses* retained to himself the whole executive power, when the judicial and executive functions admitted of separation; i.e. the whole *imperium merum* was centred in him.

B. In suits of an important character, he could either judge personally with the help of his assessors, or could delegate the case to a *duumvir*, *defensor*, *praefectus* or *curialis* as *judex pedaneus*.

If he adopted the former plan, he must hear the case himself up to *litis contestatio*, but after that stage was reached he might allow his assessors to sit alone, provided only he reheard the case finally after the assessors had prepared it for him, and gave a decision in person⁸. If he employed a *judex pedaneus*, the latter managed the business independently, judging

¹ D. 3. 1. 1. 6.

² D. 2. 7. 3. 1.

³ D. 26. 5. 4. The other ancient excerpts which, as we say, leave the functions obscure, are in D. 48. 19. 38. 10; C. 9. 22. 11; the latter being in point as containing a quotation from Paulus.

⁴ C. 3. 3. 5.

⁵ Savigny's *Droit Romain au Moyen Age*, traduit par Guénoux, p. 82.

⁶ C. 3. 1. 5.

⁷ In confirmation of this we may cite C. 3. 1. 18.

⁸ C. 3. 1. 5.

both as to law and fact, and pronouncing a definite sentence; from which, however, there was an appeal to the *praeses*¹.

The *judex pedaneus* could not sub-delegate; neither could he call in the aid of assessors².

C. In less important suits the *duumviri*, *praefectus* or *defensor* had the original jurisdiction, which they could exert by the same methods which have been already described in the case of the *praeses*. Their assessors were the *curiales*, for the rule that assessors must be foreigners did not apply to municipalities³; and their *judices pedanei* were also the *curiales*.

¹ C. 3. 3. 3.

² D. 2. 1. 5: D. 1. 21. 5. pr.: D. 1. 21. 2. pr.

³ D. 1. 22. 3.

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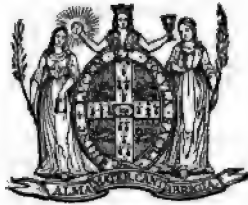
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